© The Editors and Contributors Severally 2015

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical or photocopying, recording, or otherwise without the prior permission of the publisher.

Published by
Edward Elgar Publishing Limited
The Lypiatts
15 Lansdown Road
Cheltenham
Glos GL50 2JA
UK

Edward Elgar Publishing, Inc.
William Pratt House
9 Dewey Court
Northampton
Massachusetts 01060
USA

A catalogue record for this book
is available from the British Library

Library of Congress Control Number: 2015938637

This book is available electronically in the **Elgar**online
Law subject collection
DOI 10.4337/9781782547334

ISBN 978 1 78254 732 7 (cased)
ISBN 978 1 78254 733 4 (eBook)

Typeset by Columns Design XML Ltd, Reading

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:38:18AM
via free access

Contents

List of figures vii
List of tables viii
List of contributors ix
Preface xi
List of abbreviations xix
Table of cases xxiv

PART I HUMAN RIGHTS AND SOCIAL SECURITY

1. Social security as a human right: A European perspective 3
   Eberhard Eichenhofer
2. Growing apart together: Solidarity and citizenship in Europe 32
   Dimitry Kochenov
3. Social security in the case law of the European Court of Human Rights 53
   Lieneke Slingenberg
4. Social security in the 'case law' of the Social Rights Committee 84
   George Katrougalos
5. The interaction between human rights case law: Convergence or competition? 103
   Ida Elisabeth Koch
6. The approaches of the EU Court of Justice and the European Court of Human Rights vis-à-vis discrimination on the ground of nationality in social security 121
   Frans Pennings

PART II MINIMUM STANDARDS ON SOCIAL SECURITY IN EUROPE AND THE PRINCIPLE OF EQUAL TREATMENT

7. The development of European social security standards 149
   Matti Mikkola
8. Supervision of social security standards: Between law and politics 170
   Tineke Dijkhoff
9. The coordinated governance of EU social security policy: Will there ever be enough? 201
   Paul Copeland and Beryl ter Haar
10. Equal treatment: The EU approach 231
    Susanne Burri
11. Women and social security 257
    Mies Westerveld

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:03AM
via free access

12. Social security and the disabled 281
Elisabeth Kohlbacher

PART III THE PROTECTION OF MOBILE PERSONS AND MIGRANTS

13. Principles of EU coordination of social security 321
Frans Pennings
14. Social security for mobile workers and labour law 344
Rob Cornelissen and Guido Van Limberghen
15. A European pensions union: Towards a strengthening of the European pension systems 385
Pascal Borsjé and Hans van Meerten
16. EU migrants and destitution: The ambiguous EU objectives 413
Herwig Verschueren
17. Social security protection of migrants from outside Europe 446
Gijsbert Vonk
18. Coordination of student financial aid systems: Free movement of students or free movement of workers? 468
Anne Pieter van der Mei
19. Patient mobility and healthcare in the EU 490
Oxana Golynker

PART IV EUROPEAN SOCIAL SECURITY LAW IN A GLOBAL CONTEXT

20. The EU promotion of social protection in the world 517
Marius Olivier
21. Social security law instruments of the next generation: European social security law as a source of inspiration? 534
Danny Pieters and Paul Schoukens

PART V THE FUTURE OF EUROPEAN SOCIAL SECURITY LAW

22. The land of four quarters: The future of European social security law 561
Gijsbert Vonk

Index 575

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:03AM
via free access

Figures

7.1 Combination of two minimum levels 156
9.1 Governance regime for social inclusion and social protection 211
9.2 Analytical model to analyse the legal integration capacity of EU instruments 213
22.1 Scenarios for future social security 561

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:19AM
via free access

Tables

7.1	Periodical payments to standard beneficiaries	152
7.2	50 per cent of net average income in some countries	162
8.1	Conclusions of the Committee of Social Rights on Article 12 and on all articles of the ESC and the ESC (Revised) since 1969	185
8.2	Conclusions of the Committee of Social Rights on Article 12§2 of the ESC and the ESC (Revised) since 1969	187
9.1	Overview of governance instruments for social inclusion and social protection	209
11.1	Welfare states typology according to Esping-Andersen	262
11.2	Decommodification according to Esping-Andersen	264
11.3	Breadwinner regime according to Lewis	264
11.4	Childcare according to Haas	264
11.5	Familialism according to Daly	265
15.1	Number of IORPs and assets managed by them as at end 2011	389

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:29AM
via free access

Contributors

Pascal Borsjé Pension and tax lawyer at Clifford Chance LLP, Amsterdam.

Susanne Burri Associate Professor at the School of Law of Utrecht University (the Netherlands) and specialist co-ordinator for gender equality law of the European Network of Legal Experts in Gender Equality and Non-discrimination.

Paul Copeland Assistant Professor of public policy, Queen Mary, University of London.

Rob Cornelissen Guest Professor of European social security law at the Vrije Universiteit Brussel (Belgium), and visiting professor European social security law at KU Leuven (Belgium) and the University of Ghent (Belgium).

Tineke Dijkhoff Senior Researcher at Max Planck Institute for Social Law and Social Policy, Munich (Germany).

Eberhard Eichenhofer Professor of civil and social security law at Jena University (Germany).

Oxana Golynker Lecturer in law at the University of Leicester (UK).

Beryl ter Haar Lecturer in European and international labour law, University of Amsterdam (the Netherlands).

George Katrougalos Professor of public law, Democritus University (Greece) and Minister of Labour and Social Security in Greece.

Ida Elisabeth Koch Emerita Guest Professor at Lund University (Sweden).

Dimitry Kochenov Visiting Professor and Crane Fellow in Law and Public Affairs, Woodrow Wilson School, Princeton University (United States); Chair in EU Constitutional Law, University of Groningen (the Netherlands); Visiting Professor, College of Europe, Natolin campus (Poland).

Elisabeth Kohlbacher Assistant Professor at the Institute for Austrian and European Labour Law and Social Security Law at WU Vienna University of Economics and Business (Austria).

Hans van Meerten Professor of international pension law at Utrecht University (the Netherlands) and pension lawyer at Clifford Chance LLP (Amsterdam).

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:41AM
via free access

Anne Pieter van der Mei Associate Professor in EU Law, Maastricht Centre for European Law (the Netherlands).

Matti Mikkola Professor of labour law (Emeritus), University of Helsinki (Finland).

Marius Olivier Adjunct Professor at the Faculty of Law, University of Western Australia and extraordinary professor at the Faculty of Law, North-West University (South Africa); director of the International Institute for Social Law and Policy (IISLP).

Frans Pennings Professor at Utrecht University (the Netherlands) and Gothenburg University (Sweden).

Danny Pieters Professor of social security law at KU Leuven (Belgium).

Paul Schoukens Professor of European and international social security law, KU Leuven (Belgium) and professor of international social security law at Tilburg University (the Netherlands).

Lieneke Slingenberg Assistant Professor of migration law at VU University Amsterdam (the Netherlands).

Guido Van Limberghen Professor of social security law at the Vrije Universiteit Brussels (Belgium).

Herwig Verschueren Professor of international and European social law, University of Antwerp, Vrije Universiteit Brussels (Belgium).

Gijsbert Vonk Professor of social security law at Groningen University (the Netherlands).

Mies Westerveld Professor of social insurance law at the University of Amsterdam (the Netherlands).

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:41AM
via free access

Preface

Editing a research handbook on European social security law is a challenge, since this is a broad area of the law without much coherence. If we consider the body of European social security laws it appears that there is a diverse set of rules, not only differing fundamentally in nature but also covering a diverse range of subjects. On one side of the scale there are grand principles which have been given legal status, such as the right to social security as a human right. On the other side of the scale we find technical provisions dealing with subjects like the exchange of forms between social security institutions, the mutual recognition of certain statutory definitions of invalidity and the sharing of costs of benefits paid to migrant workers. Furthermore, there are all sorts of legal norms and principles that as such have nothing to do with social security but which directly or indirectly affect the operation of social security law: competition law, property law, the EU regime on the freedom of services, directives on the transfer of undertaking, insurance directives, etc. Just simply describing the layout and substance of the variety of these rules is *not* the idea of the present research handbook. Instead it is our task to highlight issues that are fundamental, controversial or topical for European social security law and therefore relevant to further research.

It is difficult to find a consensus on what is meant by the term *social security*. A well-known approach is to refer to the types of risks listed in ILO Convention 102: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivor's benefit. However, this convention was adopted in 1952 and since then other forms have been developed that can also be considered to fall under the term social security: minimum income guarantees for all, fiscal welfare, state-regulated private insurance, individual saving schemes, etc. The concept of social security used in this book should offer sufficient intellectual space to accommodate such new approaches. Furthermore, the term *European social security* can refer both to the national social security systems (and the way these systems are regulated by law) and to the law on social security adopted by the EU or by other European organisations such as the Council of Europe. Besides, various bilateral and multilateral treaties, mostly dealing with the protection of social security rights or migrants, play a role as well.

In this book we have simultaneously adopted a broad and a narrow approach. The approach is narrow in the sense that we shall not deal with social security law from a national point of view. Instead the handbook discusses social security law as a subject of EU law and of other treaties concluded by European states. In other words, it is a research handbook on EU and international social security law in Europe, not on national comparative law. At the same time, our approach is broad in the sense that we have allowed the authors to employ a concept of social security that is most suited to their contributions. For example, for those who discuss subjects within the context of the EU regulations on the co-ordination of social security the concept is likely to be confined to the material scope of the regulations as formulated in Article 3 of

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

Regulation (EC) No 883/2004. But for the authors who are interested in human rights, the concept of social security may well stretch out to the ancillary areas of welfare, health and the protection of the handicapped. In other words, we asked the authors to employ a working definition of the concept of social security which best suits their contribution. Incidentally, the same flexibility was employed with regard to the use of expressions and terms. In other words, we have refrained from imposing any central terminology on the authors, dealing, for example, with the concepts of mobile workers, migrants, irregular stay, etc., but have allowed authors to use their own vocabulary. Thus the collection of the various contributions to the handbook constitutes a testimony to a kaleidoscopic concept of social security. In this approach it includes the whole system of providing protection, as organised, regulated or guaranteed by the State or a public body, including measures to promote individuals' responsibility and their capacity to live without claiming benefits.

While we left considerable autonomy to the authors in composing their chapters, we also made sure their work was critically assessed by their peers. For this purpose in September 2014 we organised a two-day event in Groningen, which was attended by most contributors. During 'opposition sessions' all the chapters were subjected to a process of 'collegial intervision'. This was a useful, stimulating and, above all, enjoyable experience.

This research handbook has brought together a number of themes which, in our view, are relevant to studying European social security law. We have asked the authors to not only reflect upon the present of state of law and the relevant academic literature, but also to map out questions for further research. The various themes and topics are brought together under the following five categories, which constitute the five parts of the handbook:

1. human rights and social security;
2. minimum standards on social security and the principle of equal treatment;
3. social security protection of mobile persons and migrants;
4. European social security law in a global context;
5. the future of European social security law.

I. HUMAN RIGHTS AND SOCIAL SECURITY

The first part covers six chapters. The first one, written by *Eberhard Eichenhofer*, offers a '360º introduction' to the development and meaning of social security as a human right. As such it is also a suitable general introduction to all following chapters. The author concludes that the human right to social security is both an integral and a fundamental part of human rights law. It is an integral part as it coincides with other social rights, and it is a fundamental part as it lays the ground for an economically independent life for individuals, even when they are exposed to contingencies which are beyond their control. Social security may be technical and difficult to grasp, but it is based on an idea that is easy to understand, namely that everyone has a right and hence an obligation to take part in the formation of social rights.

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

In the second chapter, *Dimitry Kochenov* discusses the link between citizenship on the one hand and social security (and in a wider sense solidarity) on the other hand. His contribution was originally intended as an introductory chapter for Part III, dealing with the protection of mobile persons and migrants, but as it outstretches the notion of EU citizenship as included in the TFEU and fits rather in the rich historical, legal and philosophical debate on the meaning of social citizenship in Europe as a whole, we felt that it was suitable as a separate introductory chapter within our human rights block.

The two chapters that follow have a more legal positivist approach. *Lieneke Slingenberg* systematically discusses the impact of the European Convention on Human Rights on social security from the angle of a number of articles included in the convention, such as Article 3 (prohibition of degrading treatment), Article 14 (non-discrimination) and Article 1 of the First Protocol (protection of property rights). According to the author, 'a cautious development can be detected in the Court's case law towards a more autonomous protection in the field of social security', which surely is a new and exciting prospect. *George Katrougalos* focuses in Chapter 4 on the findings of the European Committee on Social Rights in relation to one single article of the European Social Charter: Article 12 dealing with the right to social security. The European Committee of Social Rights has had considerable influence in the reaffirmation of this right, but this does not mean that the potential of the right has already been fully realised. According to Katrougalos, 'a genuine, subjective and fully enforceable right to social security would be not only an important guarantee against regression of social protection, but also a major contribution to the establishment of a new, European social citizenship, leading to a more fair, equitable and just society'.

In Chapter 5 *Ida Elisabeth Koch* broadens the spectrum by comparing the approaches adopted by the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice of the European Union in applying the right to social security. Do these approaches compete or move in the same direction? It is too difficult to tell: 'the interpretation of the ECHR, the ESC and the EU Charter on Fundamental Rights has hardly reached its final stage and might never come to a halt'. Nonetheless, the author considers the inclusion of the entire range of human rights in the EU Charter as a confirmation of the conception that human rights are indivisible, interrelated and interdependent. Also she is convinced that the monitoring bodies of the instruments seem perfectly aware of the existence and importance of provisions in all three instruments.

In the last chapter in this part *Frans Pennings* gives the relation between the ECHR and the EU a more concrete dimension by asking what the consequences for social security would be of the (possible) accession of EU to the ECHR. His contribution shows that while the paths of the case law of the two high European courts mostly run parallel, there are also marked differences. For example, the Court of Justice is much more critical of residence conditions in social security schemes than the Court of Human Rights.

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

II. MINIMUM STANDARDS ON SOCIAL SECURITY AND THE PRINCIPLE OF EQUAL TREATMENT

In the second part, first of all, the minimum standards in social security are addressed. These standards have been developed, although not solely, by the Council of Europe and an important question for study is how a minimum income (benefit) is defined for the Member States. For this purpose the European Committee of Social Rights has undertaken pioneering work, by developing a general standard for all Member States. Such concrete minimum standards are an interpretation of the general human right to social security, but since they are laid down in concrete norms in a convention, it is possible to question Member States that have ratified it on their compliance with the standard. For this purpose this is a valuable elaboration of the general standard. The issue of development of the standards and their enforcement in the framework of the International Labour Organization and the Council of Europe are discussed by *Matti Mikkola* in Chapter 7 and *Tineke Dijkhoff* in Chapter 8.

In EU law there are hardly any minimum standards on social security. Instead soft law instruments, such as the open method of coordination (OMC), are applied. In Chapter 9 *Paul Copeland* and *Beryl ter Haar* give an overview of the present state of affairs with the various forms of OMC. One of the issues is what is meant by soft law and how the OMC relates to the soft law category. In any case OMC is used to increase the level of protection in some areas, but compliance with the recommendations and guidelines following this instrument is difficult to enforce.

Separate attention is given to the principle of equal treatment, which can be considered to be a standard within its own right. Equal treatment provisions of the TFEU constitute an important source of protection for groups that are considered to be disadvantaged. Of course, in order to realise equal treatment a Member State could repeal an act with discriminatory rules, but since this is often politically not feasible, equal treatment rules require new approaches. Still, as we can see in Chapters 10, 11 and 12, full equal treatment has often not been realised yet and the present equal treatment law has become quite complicated in some areas. In Chapter 10 *Susanne Burri* discusses this for EU equal treatment law in general, in Chapter 11 *Mies Westerveld* focuses on equal treatment of women and in Chapter 12 *Elisabeth Kohlbacher* discusses the position of the disabled.

III. SOCIAL SECURITY PROTECTION OF MOBILE PERSONS AND MIGRANTS

In the previous parts we discussed the right to social security as a human right and standards requiring minimum provisions, of which the source could be either EU law or International Labour Organization or Council of Europe instruments; the social security schemes under study are national schemes. Part III of this volume addresses the protection of migrant persons, which concerns EU law dealing with free movement provisions. The provisions related to free movement are connected with the fundamental freedom of movement of persons and have been part of the Treaty from the very

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

establishment of the European Economic Community: Articles 48 and 51 of the EEC Treaty, now Articles 45 and 48 TFEU. These provisions are necessary in order to allow the functioning of the economic community and therefore it was required from the beginning of the EC to make binding rules on social security for migrant workers. An important aspect of this category of rules is that in principle the national systems are not changed by the rules based on Article 48, but only the negative effects of crossing borders are (sometimes only partly) compensated. This area of law constitutes a major part of the case law of the Court of Justice.

This Court has developed several coordination principles; the coordination Regulation also frequently uses the term 'principles'. In Chapter 13 *Frans Pennings* investigates how the term 'principle' is used in coordination law and what the meaning of this term is. Is it a real principle in the sense that rules must not infringe these principles or is it solely a description of a particular rule? And what is the relationship between a principle and the Treaty provisions on free movement or discrimination? A second major question is whether alternative principles can be developed and what these would entail in the context of EU coordination. Such an exercise sheds light on the implicit value of the principles developed within the coordination context.

In Chapter 14, *Rob Cornelissen* and *Guido Van Limberghen* examine how the coordination rules relate to labour law. This topic has become of increasing importance now that the border line between social security and labour law is fading due to developments such as the activation of beneficiaries and privatisation of social security. The chapter also shows the different approaches adopted in social security law and in labour law.

After this general discussion of coordination it is also relevant to discuss specific issues that have been the topic of recent debates and research. One such issue is that of pensions. Chapter 15 discusses how EU rules, including those on competition law, have an impact on pensions. *Pascal Borsjé* and *Hans van Meerten* raise the question of how much room there is at national level for legislation in the field of pensions and whether a more common EU approach would solve some of the current problems for pensions.

Another area is that of the impact of free movement rules on particular categories of persons. How are persons with low incomes affected by the coordination rules? This is addressed by *Herwig Verschueren* in Chapter 16. This chapter discusses at length the case law of the Court of Justice in this area and whether the approaches in the various judgments are consistent.

Another category is that of third-country nationals, or in a wider sense of persons from outside Europe. This is the topic of *Gijsbert Vonk* in Chapter 17. The central question of his contribution is how EU social security law impacts upon the legal position of people moving between the EU and other regions of the world. This is dealt with not only in a technical manner, but also with reference to strategic options for protecting migrant workers moving between the EU and other regions in the world, which go beyond existing EU co-ordination law. These options vary from adopting unilateral protective standards to signing up to the major global instruments on the protection of migrant workers. Attention is also paid to the possibility of linking up regional co-ordination standards, establishing an EU-Ibero-American pact.

We have seen in the introduction that the scope of social security has been growing in the past years. Two specific areas of new benefits on which there is now considerable

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

case law are those of study grants and health care. In Chapter 18 *Anne Pieter van der Mei* discusses the study grants that have been the topic of case law of the Court of Justice. Persons who claim study grants are mainly not economically active. As a result of provisions on citizenship in the Treaty, these persons can now also invoke the non-discrimination rule of the Treaty. This is often not successful and therefore raises questions as to what free movement means for citizens, to what extent Member States can protect their systems and which approaches are possible in this area.

Co-ordination and free movement (of services) rules also apply to health care, even though for a long time health care was often not considered as an economic good but rather as a collective good. The Court of Justice approached this differently and now there is case law and even a directive on cross-border health care. The topic remains very interesting, as *Oxana Golynker* shows us in Chapter 19, since there is a possibility that individuals make use of health care to the detriment of citizens in other Member States. Application of EU law creates new tensions, but may also lead to improvements in this area, such as reducing waiting lists.

IV. EUROPEAN SOCIAL SECURITY LAW IN A GLOBAL CONTEXT

This part contains two contributions. In Chapter 20 *Marius Olivier* addresses an issue that up until now has been almost entirely ignored by European social security specialists: the EU promotion of social protection in the world. After a critical and compelling analysis Olivier comes to the conclusion that the EU constitutional basis for social protection involvement in the developing world is evident: a range of comprehensive policy documents, mostly of recent origin, have given clear and explicit guidance on how development cooperation, also in the social protection area, should be conceptualised and concretised. 'Stop talking and start walking', Olivier seems to suggest: 'What is needed is not more policy direction, but actual and effective implementation and prioritisation of development cooperation and social protection along the lines indicated above and endorsed by these very instruments'. While calling for action, Olivier does not lose sight of the importance of national ownership and capacity. In this context, he advocates the approach adopted by the 2012 ILO Recommendation on social protection floors allowing for much national flexibility. He also observes that the Recommendation foresees in particular that, in implementing the Recommendation, Member States may seek technical assistance from the ILO and other relevant international organisations in accordance with their respective mandates. This accentuates the important role that EU Member States have to play in this regard.

The second chapter in this part, Chapter 21, raises the question of whether European social security law can act as a source of inspiration for other parts of the world. For the authors, *Danny Pieters* and *Paul Schoukens*, this is mostly a rhetorical question and had they raised it more fundamentally their answer would probably be 'no'. Pieters and Schoukens are critical of present social security standards in Europe. They observe that these standards do not touch (any more) upon the heart of the legal and social policy debate related to social security which is problematic as there is a strong need to be able to change the basics of social security legislation. The authors do not show much

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

interest in the discussion about alternative routes explored by global institutions such as the United Nations and the International Labour Organization to make social security standards more relevant for the developing countries. For example, in their view, the 2012 Recommendation No 202 on national floors of social protection contains 'nice principles' but lacks compelling force and hence is not likely to have much impact. Instead Pieters and Schoukens advocate a set of completely new (and presumably more compelling) standards partly derived from their own research on core principles of social security. According to the authors these are not necessarily 'social security standards as such, but standards establishing the relations between this very important area of societal and public concern, and other policy areas. Those standards would also establish direct connections between economic development and social protection levels.' In this sense the contribution is most suitable for a research handbook such as this one. Clearly, there is still a lot of work to be done to develop these standards in such a manner that they can count as the beginning of a consensus between states and various stakeholders involved.

V. THE FUTURE OF EUROPEAN SOCIAL SECURITY LAW

A final chapter, entitled 'The land of four quarters' contains a free-thinking exercise about the future of European social security law. It partly reflects some of the proposals, suggestions and views presented by the authors. In what direction will European social security law evolve? According to a matrix raster presented by *Gijsbert Vonk* this depends on two questions. Firstly, will European integration move on or grind to a halt? Secondly will social security systems consolidate as homogeneous national state systems or will they become fragmented over regional and local levels of government, private institutions and alternative protection systems such as tax law, labour law, etc.? In his view the present state of social security reflects a model which is based upon consolidated national social security schemes held together by a loose set of European rules based on limited EU supranational competences. This is the co-ordination model (referring simultaneously to EU co-ordination law and the open method of co-ordination). But no one can predict the future and one has to take account of the possibility that the model might shift. It may evolve in the direction of a supranational model in which the EU takes direct responsibility for the benefit system. Even a Europe-wide basic income is a possibility. But we must also allow for the possibility that the integration process will stop or even reverse, in which case the development of social security will be determined by uncontrollable forces or invisible hand mechanisms. A shift towards a European regulatory model is another scenario. This would allow for a fragmentation of social security under stricter European control. While the regulatory model may be implicitly embraced by many authors in this book, it is difficult to predict how such a shift in governance will affect the realisation of European social objectives, the extent of solidarity between groups and between states, protection of social risks, facilitating economic growth, etc. This is not exactly a question about which lawyers have expert knowledge. We must console ourselves with another thought: in whatever direction the model of governance evolves, European social security law is likely to remain a lawyers' paradise.

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

The aim of the handbook has been to give food for thought and to identify areas and questions that require further research. For this reason we have refrained from adopting descriptive overviews but have favoured in-depth analyses and suggestions for new approaches, also when these are provocative in nature. We hope we have succeeded in this approach and that the handbook may serve as a basis for several further projects and studies.

Frans Pennings
Gijsbert Vonk

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:40:50AM
via free access

Abbreviations

ACP	African, Caribbean and Pacific
AEF	Aid Effectiveness Framework
AEUV	Vertrag über die Arbeitsweise der Europäischen Union
A-G	Advocate-General
AGIRC	Association Générale des Institutions de Retraite des Cadres
ALMPs	Active labour market policies
AOW	Algemene Ouderdomswet
ARCCO	Association pour le régime de retraite complémentaire des salariés
ASSEP	Association d'épargne-pension
BeinstG	Behinderteneinstellungsgesetz
BGBI	Bundesgesetzblatt
BMA	British Medical Association
BMASK	Bundesministerium für Arbeit, Soziales und Konsumentenschutz
BRIC	Brazil, Russia, India and China
BSG	Bundessozialgericht
BVerfG	Bundesverfassungsgericht
CAP	Common Agricultural Policy
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEC	Commission of the European Communities
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEE	Central and Eastern Europe
CEECs	Central and Eastern European Countries
CEEP	Centre of Employers and Enterprises providing Public Services
CEO	chief executive officer
CEPS	Centre for European Policy Studies
CESCR	Committee on Economic, Social and Cultural Rights
CESR	Center for Economic and Social Rights
Cf.	compare
CFR	Charter of Fundamental Rights
CGT	Confédération Générale du Travail
CJEU	Court of Justice of the European Union
CM	Committee of Ministers

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:03AM
via free access

CMLR	Common Market Law Report
CML Rev.	Common Market Law Review
COE	Council of Europe
COM	European Commission document
CSP	Country Strategy Paper
CS-SS	Committee of Experts on Social Security
CUP	Cambridge University Press
DB	defined benefit
DC	defined contribution
DG DEVCO	Director-General Development and Cooperation
DG EMPL	Directorate General for Employment, Social Affairs and Inclusion
DRdA	Recht der Arbeit
DVBL	Deutsches Verwaltungsblätter
EAPN	European Anti-Poverty Network
EC	European Commission
ECHP	European Community Household Panel
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECLI	European Case Law Identifier
ECPR	European Consortium for Political Research
ECR	European Court Reports
ECSR	European Committee of Social Rights
ECtHR	European Court of Human Rights
ed/eds	editor/editors
EEA	European Economic Area
EEAS	European External Action Service
EEC	European Economic Community
EES	European Employment Strategy
EFTA	European Free Trade Association
EIOPA	European Insurance and Occupational Pensions Authority
EJIL	European Journal of International Law
EJML	European Journal of Migration and Law
EJSS	European Journal of Social Security
EMU	European Monetary Union
EPD	Equal Pay Directive
ERC	European Resuscitation Council
ERD	European Report on Development
ERDF	European Regional Development Fund
ERNs	European Reference Networks

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:03AM
via free access

ERRC	European Roma Rights Centre
ESC	European Social Charter
ESF	European Social Fund
ETD	Equal Treatment Directive
ETL	Equal treatment law
ETUC	European Trade Union Confederation
ETUI	European Trade Union Institute
EU	European Union
EUCFR	Charter of Fundamental Rights of the EU
EU-SILC	EU Statistics on Income and Living Conditions
EUV	Vertrag über die Europäische Union
FEAMD	Fund for European Aid to the Most Deprived
FIDH	International Federation of Human Rights Leagues
FIT	Feed-in tariff
FTI-DOL	Fast Track Initiative on Division of Labour
GDP	gross domestic product
GG	Grundgezetz
GP	general practitioner
HL	House of Lords
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICF	International Classification of Functioning, Disability and Health
IDS	Institute of Development Studies
ILC	International Law Commission
ILO	International Labour Organization
IMF	International Monetary Fund
INTEREG	Innovation and Environment Regions of Europe sharing solutions
IORP	Institutions for Occupational Retirement Provision
IZA	Institut zur Zukunft der Arbeit
JAES	Joint Africa-EU Strategy Partnership
LDC	least developed countries
MDGs	Millennium Development Goals
MICs	middle-income countries
MISSOC	Mutual Information System on Social Protection
NCPs	Network of National Contact Points
NGO(s)	Non-governmental organisation(s)
NHS	National Health Service
NIP	National Indicative Programme
NJCM	Nederlands Juristen Comité voor de Mensenrechten
NRPs	National Reform Programmes

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:03AM
via free access

NTM	Nederlands Tijdschrift voor de Mensenrechten
NWV	Neuer Wissenschaftlicher Verlag
ODA	Official Development Assistance/Overseas Development Assistance
OECD	Organisation for Economic Co-operation and Development
OFP	Organisme voor de Financiering van Pensioenen
OJ	Official Journal of the European Union
OMC	open method of coordination
OUP	Oxford University Press
PAP	Pan African Programme
PCD	Policy Coherence for Development
PM	Prime Minister
PPI(s)	Premium Pension Institution(s)
PPP	personal pension plan
PPS	Purchasing Power Standard
PSNP	Productive Safety Net Programme
PTSR	Public and Third Sector Law Reports
QIS	Quantitative Impact Study
Rec	Recital
Reg	Regulation
(R)ESC	Revised Social Charter
RGZ	Reichsgericht in Zivilsachen
RSCAS	Robert Schuman Centre for Advanced Studies
SCPs	Stability and Convergence Programmes
SEPAC	Société d'Epargne-Pension à Capital Variable
SGB	Sozialgesetzbuch
SGP	Stability and Growth Pact
SIP	Social Investment Package
SMEs	small and medium-sized enterprises
SSA	Sub-Saharan Africa
SSD	Social Security Directive
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
UCITS	Undertakings for Collective Investment in Transferable Securities
UCL	University College London
UDHR	Universal Declaration of Human Rights
UEAPME	European Association of Craft, Small and Medium-size Enterprises
UK	United Kingdom
UN	United Nations

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:03AM
via free access

UNCTAD	United Nations Conference on Trade and Development
UNHCR	United Nations High Commissioner for Refugees
US	United States
VAT	Value Added Tax
WHA	World Health Assembly
WHO	World Health Organization
WUBO	Wet uitkeringen burger-oorlogsslachtoffers 1940–1945
ZAS	Zeitschrift für Arbeitsrecht

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:03AM
via free access

Table of cases

NATIONAL CASES

Austria

Supreme Court of Justice 28 October 1986, 2 Ob 554/86 299
Supreme Court of Justice 13 June 2002, 8 ObA 79/02d 299
Supreme Court of Justice 29 September 2008, 8 ObA 43/09w 299
Constitutional Court 4 December 2007, G 113/06 299
Constitutional Court 18 March 2006, G 79/05 299
Constitutional Court 1 December 2003, G 298/02 299

Germany

Decision no 82, 15 January 2009; BVerfGE 100, 138 8

Netherlands

Institute for Human Rights, Opinions 2013-122 and 2013-17 234

Romania

Constitutional Court of Romania decision no 264, 20 March 2007 8

EUROPEAN CASES

EU Court of Justice

Acereda Herrera Case C-466/04 [2006] ECR I-5341 495
Achterberg te-Riele v Sociale Verzekeringsbank Amsterdam Cases 48/88, 106/88 and 107/88 [1989] ECR 01963 269
Akdas c.s. Case C-485/07 [2011] ECR I-04499 461
Åklagaren v Hans Åkerberg Fransson Case C-617/10 [2013] ECR nyr 237, 406
Alarape and Tijani Case C-529/11 nyr 424, 425
Albany C-67/96 [1999] ECR I-05751 ....391, 393
Aldewereld Case C-60/93 [1994] ECR I-02991 452
Alimanovic Case C-67/14 436
Allard Case C-249/04 [2006] ECR I-01513 ....356, 375
Antonissen Case C-292/89 [1991] ECR I-00745 ....348, 419
Arblade C-376/96 [1999] ECR I-08453 ....366, 368
Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres Case 236/09 [2011] ECR I-00773 238
Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft Nürnberg Joined cases C-22/08 and C-23/08 [2009] ECR I-4585 40
ATP Pension Service A/S v Skatteministeriet Case C-464/1 nyr, ECLI:EU:C:2014:139 409
B, Case C-394/13 ECLI:EU:C:2014:2199 ....353, 484, 486
Badeck Case 158/97 [2000] ECR 2000 I-01875 247
Bakker (M.J.) Case C-106/11, nyr 452, 453

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Barber (Douglas Harvey) v Guardian Royal Exchange Assurance Group Case C-262/88 [1990] ECR I-1889 233
Bartlett Case C-537/09 [2011] ECR I-3417 427
Baumbast Case C-413/99 [2002] ECR I-7091 ..... 415, 425, 431, 478
Bernini Case C-3/90 [1992] ECR I-1071 ..... 419, 420
Betriu Montull (Marc) v Instituto Nacional de la Seguridad Social, Case C-5/12, nyr 239, 240
Bettray Case 344/87 [1989] 1621 420
Bidar Case C-209/03 [2005] ECR I-2119 ..... 41, 134, 429, 430, 432, 470, 475
Bilka-Kaufhaus GmbH v Karin Weber von Hartz Case C-170/84 [1986] ECR 1607 ..... 233, 244, 269
Bosman Case C-415/93 [1995] ECR I-04921 348
Bosmann Case C-352/06 [2008] ECR I-3827 ..... 329, 350, 351, 352, 353, 486
Boukhalfa Case C-214/94 [1996] ECR I-02253 450
Brachner Case C-123/10 [2011] ECR I-10003 ..... 246, 276
Brentjens' Handelsonderneming Case C-115/97-117/97 [1999] ECR I-06025 ..... 391, 393
Bressol Case C-73/08 [2010] ECR I-2735 473
Brey Case 140/12, nyr 342, 415, 428, 433, 434, 435, 436, 437
Briheche Case 319/03 [2004] ECR I-08807 247
Brown Case 197/86 [1988] ECR 3205 419
Brunnhofer Case 381/99 [2001] ECR I-04961 245
Brusse Case 101/83 [1984] ECR 02223 ..... 359, 360
Cabanis-Issarte Case C-308/93 [1996] ECR I-02097 457
Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault Case 136/95 [1998] ECR I-201 240
Callemeyn Case 187/73 [1974] ECR 553 427
Campana Case 375/85 [1987] ECR 02387 ..... 346, 347
Carlos Garcia Avello v Etat Belge Case C-148/02 [2003] ECR I-11613 46
Casteels Case C-379/09 [2011] ECR I-01379 341
Caves Krier Case C-379/11, nyr 421, 481
Chacón Navas Case C-13/05 [2006] ECR I-6467 ..... 283, 309
Chatzi (Zoi) v Ypourgos Oikonomikon Case C-149/10 [2010] ECR I-8489 237
Chuck Case C-331/06 [2008] ECR I-01957 ..... 453, 465
Coleman C-303/06 [2008] ECR I-05603 ..... 249, 250, 253
Collins Case C-138/02 [2004] ECR I-2703 ..... 414, 415, 422, 423, 430, 432
Commission v Austria Case C-147/03 [2005] ECR I-5969 483
Commission v Austria Case C-75/11, nyr 430, 432, 435
Commission v Belgium Case C-278/94 [1996] ECR I-04307 348
Commission v Belgium Case C-408/03 [2006] I-2647 ..... 415, 431
Commission v Council Case 45/86 [1987] ECR 1493 520
Commission v European Parliament and Council Case C-299/05 [2007] ECR I-8695 428
Commission v France Case 312/86 [1988] ECR 06315 268
Commission v France Case C-512/08 [2011] CMLR 30 497
Commission v Germany Case C-68/99 [2001] ECR I-01865 ..... 356, 371
Commission v Germany Case C-341/02 [2005] ECR I-02733 366
Commission v Germany Case C-244/04 [2006] ECR I-00885 367
Commission v Greece Case 305/87 [1989] ECR 1461 414
Commission v Italy Case C-163/82 [1983] ECR 03273 268
Commission v Italy Case 63/86 [1988] ECR 29 420
Commission v Luxembourg Case C-111/91 [1993] ECR I-817 479
Commission v Luxembourg Case C-319/06 [2008] ECR I-04323 ..... 367, 368, 371
Commission v Netherlands Case C-398/06 [2008] ECR I-56 431
Commission v Netherlands Case C-542/09, nyr 421, 476, 480, 481
Commission v United Kingdom Case C-308/14 436

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Coonan Case 110/79 [1980] ECR 1445 ....323, 327
D'Hoop Case C-224/98 [2002] ECR I-6191 ....415, 423, 432
Danfoss Case 109/88 [1989] ECR 3199 245
Dano (Elisabeta) and Florin Dano v Jobcenter Leipzig C-333/13 [2014] ECLI EU:C:2014:2358 ....41, 341, 415, 425, 428, 433, 434, 435, 436, 437
Dassonville Case C-8/74 [1974] ECR 00837 396
De Cuyper Case C-406/04 [2006] ECR I-6947 ....333, 346
De Paep Case C-196/90 [1991] ECR I-04815 374
De Silva Martins Case C-388/09 [2011] ECR I-05737 352
De Weerd and others Case 343/92 [1994] ECR I-571 246
Deak Case 94/84 [1985] ECR 01873 348
Decker Case C-120/95 [1998] ECR I-1831 472
Defrenne I Case 80/70 [1971] ECR 445 ....266, 267
Defrenne (Gabrielle) Case 147/77 v Société anonyme belge de navigation aérienne Sabena [1978] ECR 1365 ....201, 237, 267
Dekker (Elisabeth Johanna Pacifica) v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus Case C-177/88 [1990] ECR I-0394 ....241, 244
Derouin Case C-103/06 [2008] ECR I-01853 ....356, 375, 426
Di Leo Case C-308/89 [1990] ECR I-4185 475
Digitalnet and others Cases C-320/11, C-330/11, C-382/11, C-383/11, nyr 287
Dos Santos Palhota Case C-515/08 [2010] ECR I-9133 417
Drake v Chief Adjudication Office Case 150/85 [1986] ECR 01995 ....268, 269
Drijvende Bokken Case C-219/97 [1999] ECR I-0612 391
Echternach and Moritz Joined Cases 389/87 and 390/87 [1989] ECR 723 478
Elchinov Case C-173/09 [2011] PTSR 1308, [2011] 1 CMLR 29 ....494, 496
Elektrobudowa Case C-396/13 367
Elrick Case C-275/12, nyr 415, 469
EMS of DFA Investment Trust Company Case C-190/12, nyr ECLI:EU:C:2014:249 408
Engelbrecht Case C-262/97 [2000] ECR I-07321 375
European Parliament v Commission Case C-403/05 [2007] ECR I-9045 520
Expedia Case C-226/11, nyr ECLI:EU:C:2012:544 409
Fahmi Case C-33/99 [2000] ECR I-562 ....473, 474, 485
Finalarte Joined cases C-49/98, C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 [2001] ECR I-07831 ....344, 365, 367
Fitzwilliam Case C-202/97 [2000] ECR I-00883 ....357, 380
Förster (Jacqueline) Case C-158/07 [2008] ECR I-8507 ....134, 138, 325, 430, 431, 432, 469
Franzen Case 382/13 EU:C:2015:261 ....329, 353, 354, 355
Frilli Case 1/72 [1972] ECR 457 ....332, 427
Garcia Avello Case C-148/02 [2003] I-11613 415
Genc Case C-14/09 [2010] I-931 479
Geraets-Smits and Peerbooms Case C-157/99 [2001] ECR I-5473 ....473, 493, 496, 497
Geven Case C-213/05 [2007] ECR I-6347 ....421, 422, 437
Giersch Case C-20/12, nyr ..... … 421, 422, 437, 476, 477, 478, 479, 480, 481, 482, 483, 484
Giletti and others Joined Cases 379-381/85 and 93/86 [1987] ECR 955 427
Gillespie Case C-342/93 [1996] ECR I-00475 246
Gilly Case C-336/96 [1998] ECR I-2793 414
Gottardo Case C-55/00 [2002] ECR I-00413 ....459, 460, 461, 462, 465
Gottwald Case C-103/08 [2009] ECR I-9117 ....430, 432, 435
Government of the French Community and Walloon Government v Flemish Government Case C-212/96 [2008] ECR I-1683 ....33, 139
Graf Case C-190/98 [2000] ECR I-00493 348
Gravier Case C-293/83 [1985] ECR 593 ....470, 487
Grimaldi Case C-322/88 [1989] ECR 04407 409

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Grzelczyk Case 184/99 [2001] ECR I-6193 ..... 134, 341, 415, 429, 430, 432
Guiot Case C-272/94 [1996] ECR I-01905 366
Hartmann Case C-212/05 [2007] ECR I-06303 347
Hendrix Case C-287/05 [2007] ECR I-6909 ..... 331, 332, 342, 428
Hervein and Lorthiois Cases C-393/99 and C-394/99 [2002] ECR I-2829 ..... 330, 338, 371
HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab Case C-335/11, nyr 242
Hoeckx Case 249/83 [1985] ECR 982 ..... 341, 419
Hofmann (Ulrich) v Barmer Ersatzkasse Case 184/83 [1984] ECR 3047 ..... 239, 268
Höfner and Elser Case C-41/90 [1991] ECR I-01979 393
Hogan and others v Minister for Social and Family Affairs Case C-398/11, nyr, ECLI:EU:C:2013:272 403
Hudzinski and Wawrzyniak Cases C-611/10 and C-612/10, EU:C:2012:339 ..... 329, 351, 352, 353, 354, 366, 376, 378, 486
Ibrahim Case C-310/08 [2010] ECR I-1065 ..... 424, 425, 478
Inizan Case C-56/01 [2003] ECR I-12403 380
Inzirillo Case 63/76 [1976] ECR 2057 427
Ioannidis Case C-258/04 [2005] ECR I-08275 ..... 348, 422, 423, 430
ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit Case C-208/05 [2007] ECR I-00181 348
Janko Rottmann v Freistaat Bayern Case C-135/08, [2010] ECR I-1449 ..... 35, 36
Jauch Case C-215/99 [2001] ECR I-1901 428
Jeltes Case C-443/11 ECLI:EU:C:2013:224 371
Jette Ring, Case C-335/11, nyr 250
Johnston (Marguerite) v Chief Constable of the Royal Ulster Constabulary Case 222/84 [1986] ECR 1651 239
Jørgensen Case C-226/98 [2000] ECR I-2447 246
Khalil and others Cases C-95/99 to 98/99 [2001] ECR I-07413 458
Kalanke Case 450/93 [1995] ECR I-03051 247
Kamberaj Case C-571/10, nyr 117, 118
Karsten Kaltoft Case C-354/13, nyr 286, 290
Kattner Stahlbau Case C-350/07 [2009] ECR I-01513 404
Keller Case C-145/03 [2005] ECR I-02529 380
Kempf Case 139/85 [1986] ECR 1741 ..... 419, 420
Kenny Case C-1/78 [1978] ECR 01489 566
Kersbergen-Lap Case C-154/05 [2006] ECR I-6249 ..... 342, 427, 428
Khalil Case 95/99 [2001] ECR I-7413 ..... 136, 139, 140
Klaus Case 482/93 [1995] ECR I-3551 335
Kleist Case C-356/09 [2010] ECR I-11939 313
Knoch Case C-102/91 [1992] ECR I-04341 ..... 346, 376, 377
Koelsch Case C-29/10 [2011] ECR I-01595 ..... 358, 360, 362, 372, 378
Kohll Case C-158/96 [1998] ECR I-1931 ..... 418, 472, 493, 494, 497
Koua Poirrez v France Case C-206/91 [1992] ECR 6685 126
Kreil (Tanja) v Bundesrepublik Deutschland Case C-285/98 [2000] ECR I-69 239
Kücükdeveci (Seda) v Swedex GmbH & Co. KG Case C-555/07 [2010] ECR I-00365 237
Kziber Case C-18/90 [1991] ECR I-00199 461
L.N. Case C-46/12, nyr 415, 419, 420
Lair Case 39/86 [1988] ECR 3161 ..... 423, 475, 479
Lassal Case C-162/09 [2010] ECR I-9217 ..... 415, 435
Laumann Case 115/77 [1978] ECR 00805 458
Laval Case C-341/05 [2007] ECR I-11767 ..... 367, 368, 398, 404
Lawrie-Blum Case 66/85 [1986] ECR 2121 419
Lebon Case 316/85 [1987] ECR 02811 ..... 348, 419, 475, 481

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Leclere Case 43/99 [2001] ECR I- 4265 ..... 336, 428, 485
Leichtle Case C-8/02 [2004] ECR I-2641 495
Levin Case 53/81 [1982] ECR 1035 ..... 420, 479
Leyman Case C-3/08 [2009] ECR I-9085 ..... 338, 339, 342, 343, 371, 375
Lommers Case 476/99 [2002] ECR I 02891 ..... 247, 248
London Borough of Harrow v Nimco Hassan Ibrahim and the Secretary of State for the Home Department Case C-310/08 [2010] ECR I-1065 ..... 40, 41
Lopez-da Veiga Case C- 9/88 [1989] ECR 02989 450
Luca Case C-430/12 Order of the Court of 11 July [2013] OJ C304/3 495
Luxemburg v European Commission Case T-549/08 [2010] ECR I-2477 219
Luyten Case 60/85 [1986] ECR 02365 350
McCarthy Case C-434/09 [2011] ECR I-3375 415
Mangold (Werner) v Rüdiger Helm Case C-144/04 [2005] ECR I-09981 237
Manpower Case 35/70 [1970] ECR 01251 356
Marschall Case C-409/95 [1997] ECR I-06363 248
Martínez Sala Case 85/96 [1998] ECR I-2691 ..... 134, 326, 348, 429
Mattern and Cikotic Case C-10/05 [2006] ECR I-3145 420
Mazzoleni Case C-165/98 [2001] ECR I-02189 366
Meeusen Case C-337/97 [1999] ECR I-03289 347
Meints Case C-57/96 [1997] ECR I-06689 ..... 346, 347
Meeussen Case C-337/97 [1999] ECR I-3289 476
Miethe Case 1/85 [1986] ECR 1837 333
Minister voor Immigratie, Integratie en Asiel v O and Minister voor Immigratie, Integratie en Asiel v S Joined Cases C-456/12 and C-457/1 ECLI:EU:C:2013:837 39
Moreno (Isabel Elbal) v Instituto de la Seguridad Social (INSS) and Tesoría General de la Seguridad Social (TGSS) Case C-385/11 ECLI:EU:C:2012:746 276
Moscato Case 481/93 [1995] ECR I-3525 335
Mouthaan Case 39/76 [1976] ECR 1901 ..... 135, 333
Müller-Fauré and van Riet Case C-385/99 [2003] ECR I-4509 ..... 492, 496, 501
Newton Case C-356/89 [1991] ECR 3017 427
Ninni-Orasche Case C-413/01 [2003] ECR I-13187 ..... 419, 420, 423
Nolte Case C-317/93 [1995] ECR I-04625 ..... 246, 269, 270, 420
Nonnenmacher Case 92/63 [1964] ECR 00557 349
O'Flynn Case C-237/94 [1996] ECR I-2617 472
Öberg Case C-185/04 [2006] ECR I-01453 348
Odar Case C-152/11, nyr 311
Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich Case C-220/02 [2004] ECR I-5907 ..... 246, 250
Otte Case C-25/95 [1996] ECR I-03745 346
P v S and Cornwall County Council Case C-13/94 [1996] ECR I-02143 241
Paletta Case C-45/90 [1992] ECR I-03423 ..... 345, 379
Parliament v Council and Commission Joined Cases C-181 and 248/91 [1993] ECR I-3685 520
Parliament v Council Case C-316/91 [1994] ECR I-625 520
Pavlov Case C-180/98 [2000] ECR I-06451 393
Perez Naranjo Case C-265/05 [2007] ECR I-347 428
Petersen Case C-228/07 [2008] ECR I-06989 ..... 346, 373, 375, 418, 419, 426
Petersen (Domnica) v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe Case C-341/08 [2010] ECR I-00047 241
Petit Case 153/91 [1992] ECR I-4973 ..... 136, 139, 140
Petroni Case 24/75 [1975] ECR 1149 ..... 324, 333, 336, 339, 351, 352
Petru, Case C-268/13, nyr 496
Pfleger Case C-390/12, nyr ECLI:EU:C:2014:281 406
Piatowski Case C-493/04 [2006] ECR I-02369 ..... 356, 371

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Pinna Case 41/84 [1986] ECR 1 ....135, 322, 325, 426
Piscitello Case 139/82 [1983] ECR 1427 427
Plum Case C-404/98 [2000] ECR I-09379 357
Poirrez Case C-206/91 [1992] ECR I-06685 457
Portugaia Case C-164/90 [2002] ECR I-00787 ....366, 367
Portugal v Council Case C-268/94 [1996] ECR I-6177 520
Prete Case C-367/11 ECLI:EU:C:2012:668 ....348, 414, 415, 422, 423, 482
Prigge (Reinhard) and Others v Deutsche Lufthansa AG Case C-447/09 [2011] ECR I-08003 241
Prinz and Seeberger Joined Cases C-523/11 and C-585/11, nyr 415, 475
Pusa Case C-224/02 [2004] ECR I-5763 415
Ring/Werge Cases C-335/11, C-337/11, nyr 283, 299, 308-310, 313, 315
Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG Case C-171/88 [1989] ECR 02743 269
Roca Álvarez (Pedro Manuel) v Sesa Start España ETT SA Case C-104/09 [2010] ECR I-08661 240
Rockler Case C-137/04 [2006] ECR I-01441 348
Roks and others v Bestuur van de BVG Case C-343/92 [1994] ECR I-00571 ..... 245, 246, 269
Rottmann Case C-135/08 [2010] I-1449 415
Royer Case C-48/75 [1976] ECR 00497 455
Rüffert Case C-346/06 [2008] ECR I-01989 368
Rush Portuguesa Case C-113/89 [1990] ECR I-01417 344
Rutten Case C-383/95 [1997] ECR I-00057 ....362, 378
Saciri and others Case C-79/13, nyr 118, 417, 439
Saint-Prix Case C-507/12 opinion of 12 December 2013 ....415, 423, 424
Salamink Case C-347/10, nyr 449
SantanderJoined Cases C-338/11 to C-347/11, nyr, ECLI:EU:C:2012:286 408
Schlecker Case C-64/12 ECLI:EU:C:2013:241 ....360, 361, 363, 364, 365, 373, 379, 380
Schulz-Delzers and Schulz Case C-240/10 [2011] ECR I-8531 414
Scutari Case 76/72 [1973] ECR 46 481
Seco Cases 62 and 63/81 [1982] ECR 00223 366
Seymour-Smith and Laura Perez Case C-167/97 [1999] ECR I-00623 245
Sirdar (Angela Maria) v The Army Board and Secretary of State for Defence Case C-273/97 [1999] ECR I-07403 239
Skalka Case 160/02 [2004] ECR I-5613 427
Snares Case C-20/96 [1997] ECR I-6057 427
Somova Case C-103/13 ECLI: EU:C:2014:2334 344
Sonia Chacón Navas v Eurest Colectividades SA Case C-13/05 [2006] ECR I-06467 242
Spain v Commission Cases T-264/10 and T-266/10 nyr 219
Stamatelaki Case C-444/05 [2007] ECR I-3185 495
Steymann Case 196/87 [1988] ECR 6159 420
Stöber and Piosa Pereira Cases C-4/95 and C-5/95 [1997] ECR I-511 420
Sürül Case 262/96 [1999] ECR I-2685 ....326, 461
Swaddling Case C-90/97 [1999] ECR I-1075 ....432, 475
Tas-Hagen en RA Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad Case C-192/05 [2006] ECR I-10451 40
Teixeira v London Borough of Lambeth and Secretary of State for the Home Department Case C-480/08 [2010] ECR I-1107 ....40, 41, 424, 425
Ten Holder Case 302/84 [1986] ECR 1821 ....328, 329, 332, 350, 486
Terhoeve Case C-18/95 [1999] ECR I-00345 348
Testa, Maggio and Viale Cases 41/79, 121/79 and 796/79 [1980] ECR 1979 ....142, 333, 336

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Teuling-Worms v Bestuur voor de Bedrijfsvereniging voor de Chemische Industrie Case 30/85 [1987] ECR 02497 270
The Queen and Immigration Appeal Tribunal v G D Antonissen Case C-292/89 [1991] ECR I-745 40
Thiele Meneses Case C-220/12, nyr 415, 469
Torresi Joined Cases C-58/13 and C-59/12 ECLI:EU:C:2014:2088 478
Trojani Case C-456/02 [2004] ECR I-7573 ....420, 429, 432
United Kingdom v Commission (Social Exclusion) Case C-106/96 [1998] ECR I-2729 ....204, 218
United Kingdom v Council Case C-84/94 [1996] ECR I-5755 312
Van Delft Case C-345/09 [2010] ECR I-9879 ....344, 352, 371
Van der Elst Case C-43/93 [1994] ECR I-03803 344
Van der Vecht Case 19/67 [1967] ECR 00445 ....349, 356
Van Gestel Case C-454/93 [1995] ECR I-01707 360
Van Munster Case 165/91 [1994] ECR I-4661 ....337, 339, 343, 375
Van Pommeren Case C-227/03 [2005] ECR I-06101 373
Vanbraekel Case C-368/98 [2001] ECR I-5363 494
Vatsouras Joined cases C-22/08 and C-23/08 [2009] ECR I-04585 ....348, 420, 422, 423, 430, 432, 435
Vicoplus Joined Cases C-307/09 to 309/09 [2011] ECR I-00453 366
Viking Case C-438/05 [2007] ECR I-10779 ....398, 404
Von Chamier Case C-208/07 [2009] ECR I-06095 ....352, 371, 376, 426
Voogsgeerd Case C-384/10 [2011] ECR I-13275 362
Vougioukas Case 443/93 [1995] ECR I-4033 341
Wachauf (Hubert) v Bundesamt für Ernährung und Forstwirtschaft Case C-5/88 [1989] ECR 02609 406
Walloon government v Flemish government Case C-212/06 [2008] ECR I-01683..356, 373, 375, 458
Walrave/Koch Case C-36/74 [1974] ECR 01405 ....449, 450
Watts Case C-372/04 [2006] ECR I-04325 ....380, 493, 496, 503
Webb Case 279/80 [1981] ECR 03305 366
Wolff and Müller Case C-60/03 [2004] ECR I-09553 367
X, Case C-318/13 ECLI:EU:C:2014:213 276
Zhu and Chen Case C-200/02 [2004] I-9925 ....415, 431
Ziolkowski and Szeja Joined Cases C-424/10 and C-425/10 [2011] ECR I-14035 ....415, 431
Opinion 1/78 International Agreement on Natural Rubber [1979] ECR 2871 520
Opinion 2/13, not yet reported, ECLI:EU:C:2014:2454 121

European Committee of Social Rights (ECSR)

Autisme Europe v France Collective Complaint 13/2002 (4 November 2003) 94, 98, 157
CEDR v Bulgaria (18 October 2006 88
CEDR vs Italy (7 December 2005) 88, 90
CEDR vs Bulgaria, (18 October 2006) 88
Confédération générale du travail (CGT) v France Complaint 55/2009 (23 June 2010) 96, 99
Confédération Française de l'Encadrement (CFE-CGC) v France Complaint 16/2003 (12 October 2004) 96, 98
Conference of European Churches (CEC) v The Netherlands Complaints No 90/201 and No 86/2012 (11 November 2014) 252
ECHR v Greece Complaint 15/2003 98
ERRC v Greece (8 December 2004) 88, 98
European Roma Rights Centre v Bulgaria Complaint 31/2005 (10 October 2005) 87

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Federation of Employed Pensioners of Greece (IKA –ETAM) v Greece, CC No 76/2012; Panhellenic Federation of Public Service Pensioners v Greece, CC 77/2012; Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece, CC 78/2012; Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece, CC 79/2012; Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece, CC 80/2012 .....160, 161
FIDH v France Complaint 14/2003 (8 September 2004).....93, 94
General Federation of employees of the national electric power corporation (GENOPDEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece Complaint 65/2011 (23 May 2012) 97
ICJ v Portugal Complaint 1/1998 (10 September 1999) 87
International Commission of Jurists v Portugal Complaint 1/1998 (10 September1999).....88, 98, 99
International Federation of Human Rights Leagues (FIDH) v France Collective Complaint No 14/2003 (8 September 2004) 115
Marangopoulos Foundation for Human Rights v Greece.....99
Panhellenic Federation of the Public Electricity Corporation (POS-DEI) v Greece Complaint No 79/2012 (7 December 2012) 114
Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece Complaint No 80/2012 (7 December 2012).....90, 97, 114
Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece Complaint no 78/2012 (7 December 2012) 114
SAIGI – Syndicat des Hauts Fonctionnaires v France Complaint 29/2005 (14 June 2005).....87
Syndicat national des professions du tourisme v France Complaint 6/1999 (10 October 2000) 87
Collective Complaint 68/2011.....90

European Court of Human Rights (ECtHR)

Aden Ahmed v Malta App no 55352/12 (23 July 2013).....76
Airey v Ireland App no 6289/73 (9 October 1979).....53, 105
Andrejeva v Latvia App no 55707/00 (18 February 2009).....62, 64
Andrle v Czech Republic App no 6268/08 (17 February 2011).....72
Annoni di Gussola and Others v France App nos 31819/96 and 33293/96 (14 November 2000) 53
Asmundsson v Iceland App no 60669/00 (12 October 2004) 59, 131, 132
B v United Kingdom App no 36571/06 (14 February 2012).....57
Bah v United Kingdom App no 56328/07 (27 September 2011).....62, 66, 68
Balakin v Russia App no 21788/06 (4 July 2013) 54
Buckley v United Kingdom App 20348/92 (25 September 1996).....98
Budina v Russia App no 45603/05 (18 June 2009) 74, 106
Burden v United Kingdom App no 57325/00 (13 November 2007) 129
C v Belgium App no 21794/93 (7 August 1996) 65
Carson and others v United Kingdom App no 42184/05 (16 March 2010).....68, 129, 130, 141
Chapman v United Kingdom App 27238/95 (18 January 2001) 98
Connors v United Kingdom App 66746/01 (27 May 2004) 98
Cyprus v Turkey App no 25781/94 (10 May 2001).....79, 80
Damjanac v Croatia App no 52943/10 (24 October 2013) 57, 58
Deumeland v Germany (29 May 1986).....107
DH and Others v Czech Republic App no 57325/00 (7 February 2007) 129
Efe v Austria App no 9134/06 (8 January 2013).....69, 70, 110, 111, 130
Fawsie v Greece and Saidoun v Greece (28 October 2010).....108
Feldbrugge v the Netherlands 107

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Gaygusuz v Austria App no 17371/90 (27 September 2011) 18, 55, 62, 63, 66, 73, 108, 123, 124, 125, 128, 139
Goudswaard-Van der Laans v Netherlands App no 75255/01 (22 September 2005) 58
Halimi v Austria and Italy App no 53852/11 (18 June 2013).....76
Hobbs, Richards, Walsh and Green v United Kingdom (14 November 2006).....109
Hoogendijk v Netherlands App no 58641/00 (6 January 2005) 58, 59
Iwaszkiewicz v Poland App no 30614/06 (26 July 2011).....58, 59
Keegan v Ireland (26 May 1994).....105
Kjartan Ásmundsson v Iceland (12 October 2004).....114
Kjeldsen, Busk Madsen and Pedersen App nos 5095/71 and 5920/71 (7 December 1976) 129
Klein v Austria App no 57028/00 (3 March 2011) 57, 59
König v Germany (28 June 1978) 107
Konstantin Markin v Russia App no 30078/06 (22 March 2012) 72, 107
Kopecky v Slovakia, 2004-IX § 35.....131
Koua Poirrez v France Appl no 40892/98 (30 September 2003) 18, 63, 126, 128, 140
Lakićević and others v Montenegro and Serbia App nos 27458/06 et al (13 December 2011) ..59
Larioshina v Russia App no 56869/00 (23 April 2002).....74, 106
LB v Austria App no 39802/98 (18 April 2002) 128
Luczak v Poland App no 77782/01 (27 November 2007).....64, 126, 128, 140
Maggio and others v Italy App nos 46286/09 et al (31 May 2011) 59
Makuc and others v Slovenia App no 26828/06 (26 June 2012).....79
Mastromatteo v Italy App no 37703/97 (24 October 2002).....79
Mehmet Şentürk and Bekir Şentürk v Turkey App no 13423/09 (9 April 2013) 79, 80, 81
Mohammed Hassan and others v the Netherlands and Italy App no 40524/10 and others (28 August 2013).....78
Mohammed Hussein and others v the Netherlands and Italy App no 27725/10 (2 April 2013)..78
Moskal v Poland App no 10373/05 (15 September 2009) 56, 57, 58, 59, 132
Moustaquim v Belgium App no 12313/86 (18 February 1991).....65, 127
MSS v Belgium and Greece App no 30696/09 (21 January 2011) 74, 75, 76, 77, 78, 106
Müslim v Turkey App no 53566/99 (26 April 2005) 75
N v United Kingdom App no 26565/05 (27 May 2008) 53, 78, 80, 81
Ndikumana v Netherlands (6 May 2014).....75, 78
Niedzwiecki v Germany App no 58453/00 (25 October 2005).....61, 64, 65, 107
Nitecki v Poland App no 65653/01 (21 March 2002).....79, 81
Okpisz v Germany App no 59140/00 (25 October 2005).....61, 64, 65
Osman v United Kingdom App no 23452/94 (28 October 1998).....79
Oyal v Turkey App no 4864/05 (23 March 2010).....81
Panaitescu v Romania, App no 30909/06 (10 April 2012) 79, 80
Pancenco v Latvia Admissibility (28 October 1999) 106
Pentiacova and 48 others v Moldova App no 14462/03 (4 January 2005) 61, 79, 80, 81
Petrovic v Austria App no 20458/92 (27 March 1998).....61, 62, 72, 107, 108, 125, 268
Pibernik v Croatia (4 March 2004).....105
Pichkur v Ukraine App no 10441/06 (7 November 2013) 69, 70, 130, 131
Ponomaryovi v Bulgaria App no 5335/05 (21 June 2011) 65, 66, 68
Powell v United Kingdom App no 45305/99 (4 May 2000).....79
Ramaer and Van Willigen v Netherlands App no 34880/12 (23 October 2012).....57, 58, 59, 61
Ranjit Singh v France, Appl No 27561/09 (20 June 2006).....235
Rangelov v Germany (App no 5123/07 (22 March 2012) 67
Rasmussen v Poland App no 38886/05 (28 April 2009) 56, 58, 62
Raviv v Austria App no 26266/05 (13 March 2012).....56
RR v Poland App no 27617/04 (26 May 2011) 76
Runkee and White v United Kingdom App no 42949/98 (10 May 2007).....71
Rusin v Poland App no 25360/04 (2 October 2012).....57

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Salesi v Italy (26 February 1993) 107
Schuler-Zgraggen v Switzerland (24 June 1993) 106
SHH v United Kingdom App no 60367/10 (29 January 2013).....75
Sidabras and Dziautas v Lithuania App nos 55480/00 and 59330/00 (27July 2004).....53
SL v Austria App no 45330/99 (9 January 2003) 62
Sørensen and Rasmussen v Denmark App nos 52562/99 and 52620/99 (11 January 2006) 189
Stec v United Kingdom App nos 65731/01 and 65900/01 [2005] 41 EHRR SE 295, 51 ....18, 56, 60, 61, 71, 72, 108, 109, 114, 124, 125
Stec and Others v United Kingdom Admissibility (6 July 2005) 109
Stec and Others v United Kingdom (12 April 2006) 109
Stefanetti and others App no 21838 (15 April 2014).....58, 59, 111, 112
Stjerna v Finland (25 November 1994) 105
Sufi and Elmi v United Kingdom App nos 8319/07 and 11449/0 (28 June 2011).....75-76, 77, 78
Świątek v Poland App no 8578/04 (4 December 2012).....57
Tarakhel v Switzerland App no 29217/12 (4 November 2014) 76, 78
Tyrer v United Kingdom (25 April 1978).....106
Valkov and others v Bulgaria App nos 2033/04 et al (25 October 2011) 58, 132
Van Raalte v Netherlands App no 20060/92 (21 February 1997).....70
Wiater v Poland App no 42290 (15 May 2012) 81
Wessels-Bergervoet v Netherlands App no 34462/97 (4 June 2002) 70-71
Wieczorek v Poland, App no 18176/05 (8 December 2009) 58
Zeman v Austria App no 23960/02 (29 June 2006).....72, 109

UN Human Rights Committee

Bikramjit Singh Communication 1852/2008 (HRC, 4 December 2012).....235

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:13AM
via free access

1. Social security as a human right: A European perspective

Eberhard Eichenhofer

I. A HUMAN RIGHTS PERSPECTIVE ON SOCIAL SECURITY

I.i Social Security – A Multifaceted Institution

The concept of social security is vague and the idea of social rights as human rights is highly controversial. So, it is worthwhile to outline the origin of the concept of social security. In doing this, it is necessary to illustrate its overall importance in the framework of a post-World War II reconstruction of Europe and the world. During this era the idea of social human rights also gained enormous momentum; it brought about the international turn in the development of human rights.

Social security has many facets. It matters in a social context as a means to transfer income and to give access to medical, educational and rehabilitative services in order to re-integrate its recipients into the labour market. Due to its costs, social security is also of outstanding economic importance. So, it is a central, constant and controversial matter of politics in each state and it contributes substantially to big government. Just as it drives and deepens social justice, it also raises profound questions on social philosophy.

I.ii Social Security as a Matter of Law

Social security is created by legislation as an important matter of law. It assumes different dimensions. In legal analysis social security represents a part of the legal system of all advanced societies. It represents a substantial part of public administration, which is not primarily focused on limiting individual freedom, levying taxes or discerning lawful from unlawful actions, but is a service-rendering institution, and, thus, reveals its benevolent side. Social administration is not conceived as embarrassing individuals in their freedom, but as bringing about individual freedom. To make those substantial payments or services feasible, it also levies substantial contributions as well.

Social security also creates legal, individually enforceable entitlements. Benefits in social security are not public alms, as they are not one-sided transfers of money or service from the public purse to the individual. The transfer organised by social security is embedded in a legal relationship, if the legal requirements are met by the beneficiary on the latter's application and the administration confirms that the prerequisites of the legal entitlement are fulfilled, and, so, social administration delivers pensions, unemployment payments or health care on a mandatory basis.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

I.iii Social Security as Human Right

The human right to social security found its first expression as an international legal guarantee in the Universal Declaration of Human Rights of 10 December 1948. It gave rise to social rights as human rights of the second generation within an international system to secure human rights, established by this instrument in the first instance as a non-binding declaration of principles. This approach changed the conceptual basis of human rights legislation substantially. Before this turn in international rights, human rights were conceived as the key domain of national legislation. World War II made evident, however, that the independent national state can no longer reliably guarantee them. Since Article 22 of the Universal Declaration of Human Rights enacted a human right to social security, each human being is the addressee of this right. Since then social security[1] has been not only a matter of law and an individual right, but it implies that each human being must have such a right and that it is to be safeguarded by each state. By enacting international human rights the international legislation required the states to build up institutions of social security, in which individual rights to social security are given to each individual and to make the competent state responsible.

The human right of social security made the establishment of a universal and comprehensive system of social security with a wide range of substantial benefits to each human being a mandatory imperative of all states. Under such international human rights legislation the states are no longer free to decide on whether and how they should establish a social security system. Such guarantee implies a system of international provisions on the scope, structure and ways and means of giving shape to social security and corresponding rights provided for by such system. In the context of international law it becomes a matter of international control and supervision whether and to what extent a state complies with the requirements stemming from this human rights commitment.

To analyse the human right to social security, the notion of the concept social security will be clarified (II), its origin and further impact of the international turn in human rights' enactment will be outlined (III), the legal characteristics of social rights will be identified and examined as to whether they can comply with the idea of human rights (IV), and, finally, the content of the human right to social security both on the international and European level will be described and interpreted (V).

[1] The concept varies as to different jurisdictions; in the USA it means pensions, in the UK it means benefits in cash and in the EU and the ILO it stands for the system of social protection providing benefits in both cash and in kind. In the subsequent parts of the text the concept is conceived in this latter, broad sense.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

II. THE CONCEPT OF SOCIAL SECURITY

II.i History of the Concept

The concept of social security was created in the USA. When the Social Security Act was adopted in 1935, this law gave a positive answer to the proposals made by the social insurance movement, which emerged during World War I. But this concept was based on the European history of the 19th and 20th centuries, where the idea of the 'Social State' was elaborated by philosophers, lawyers and sociologists such as Hegel, Lorenz von Stein or Tönnies. In this approach the state and the society are not seen as being disconnected from one another, but rather the state should take part in societal development and rebalance unbalanced societies. This development of the intellectual history of Europe in the 19th century is echoed in Article 25 of the Greek Constitution, which makes it mandatory for the state to foster national as well as social solidarity. Awareness grew that the modern state is determined to prevent poverty and destitution. On this basis, by the end of the 19th century social insurance was implemented starting with Central Europe (Germany and the Austrian Hungarian Monarchy), but quickly spreading also to Northern Europe and Western Europe.

The protagonists for social security advocated for its implementation on the basis of a comparative analysis of social insurances in the world – above all in Europe – and for taking such an initiative also in the USA,[2] to overcome poverty, destitution, bad health and want. This could, and hence should, be made feasible in a society which is able by virtue of its technical and economic potential to get rid also of social hardship. The Social Security Act established social protection in old age, disability, unemployment and – since 1939 – for widows and orphans. It was financed by a federal tax; the latter could be replaced by a contribution in the context of a state-organised unemployment insurance system.

Based upon the experience of this reform Franklin D Roosevelt, the US President of this era of World War II, summarised the aims, after the War ended in success, that the USA intended to drive a world in which the 'four fundamental freedoms'[3] would be unleashed. These freedoms were both specified and safeguarded. They were characterised by him in the following words:

> The first is freedom of speech and expression – everywhere in the world. The second is freedom of every person to worship God in his own way – everywhere in the world. The third is freedom from want – which translated into world terms, means economic undertakings which will secure to every nation a healthy peacetime life for its inhabitants – everywhere in the world. The fourth is freedom from fear – which translated into world terms, means a world-wide reduction of armaments to such a point and in such a function that no nation will

[2] Barbara N Armstrong, *Insuring the Essentials* (Macmillan 1932); Abraham Epstein, *Insecurity: A Challenge to America* (American Economic Association 1933); Gaston Rimlinger, *Welfare Policy and Industrialization in Europe, America and Russia* (John Wiley and Sons 1971) 194.

[3] Franklin D Roosevelt, 'The Annual Message to the Congress, January 6th, 1941', in Samuel Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt, vol VI (War – and Aid to Democracies)* (New York 1941) 663 at 672.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

> be in a position to commit an act of physical aggression against any neighbour – anywhere in the world.

On 4 August 1941, Winston Churchill and Franklin D Roosevelt – the two leaders of the Western Allies in World War II – agreed on the Atlantic Charter. It represented the principles and targets for the renewal of the world after the military victory over the aggressive Nazi Germany. In Article 5 of this Charter they agreed 'to bring about the fullest collaboration between all nations in the economic field with the object of securing for all, improved labour standards, economic advance and social security'. In Article 6 they imagined the vision of a post-War order based on 'the freedom from fear and want'.

This was the lesson drawn from the experience that social unrest and economic insecurity gave rise to the emergence of Nazi tyranny: 'People who are hungry, and out of a job are the stuff of which dictatorships are made.'[4] In this context US President Franklin D Roosevelt spoke of 'a second Bill of Rights [with] a new basis of security and prosperity'. This included:

> The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation; The right to earn enough to provide adequate food and clothing and recreation; The right of every farmer to raise and sell his products at a return which will give him and his family a decent living; The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad; The right of every family to a decent home; The right to adequate medical care and the opportunity to achieve and enjoy good health; The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; The right to a good education. All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.[5]

II.ii Legal Concept

As to Article 22 of the Universal Declaration of Human Rights 'everyone, as a member of society, has the right to social security'. This provision on principles of human rights makes clear that social security rights are enshrined in the membership within a given society. Social security is – in other words – embedded in and determined to ensure social inclusion. The formal and official definition of social security is given by ILO Convention No. 102, concluded on 28 June 1952 at the Geneva International Labour Conference. In this instrument social security is characterised by benefits of nine different branches, i.e. medical care and income replacement in the cases of sickness,

---

[4] Franklin D Roosevelt, 'Speech of January 11th, 1944, 'For unless there is security here at home there cannot be lasting peace in the world' – 'Message to the Congress on the State of the Union', in Samuel Rosenman, *The Public Papers and Addresses of Franklin D. Roosevelt, vol. VIII, Victory and the Threshold of Peace* (New York 1950) 32 at 40.

[5] Ibid 41.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

unemployment, old age, employment injury and occupational diseases, family charges, maternity, invalidity and widowhood and the status of an orphan.[6]

This definition is inspired by the social protection, traditionally organised by social insurance, as it had been established since the last decades of the 19th century, in order to protect the working population against the main social risks – risks that stem from participation in the labour market. The protection organised under social security replaces the income lost by a worker in cases when the social contingencies of work happened. In the advanced form of today social security tends to integrate also the non-working, even the non-able-bodied population into its system of protection. In a social security system based on human rights, a universal protection is provided for the whole resident population.

Such protection is based on the implicit assumption of a society based on work. It presupposes that every individual earns his/her living by carrying out some productive or reproductive activities. They bring about an economic return, predominantly by doing dependent work. Returns from productivity should allow each individual to meet his/her needs on the market of consumer goods. If someone becomes unable to work due to circumstances beyond his/her control and hence loses income necessary to afford to live, social security is bound to replace the lost income for those temporarily or permanently out of work.

II.iii The Human Right in National Constitutions

The Constitutions of the Czech Republic (Article 26 of the Czech Charter of Fundamental Rights), Greece (Article 22), Italy (Article 38), Latvia (Article 10), Lithuania (Article 52), Luxembourg (Article 11), Romania (Articles 34, 41, 47), Slovenia (Article 50), Spain (Article 49), Sweden (Article 2(2)), and Switzerland (Article 41) provide special clauses on social security. They impose on the legislation the commitment to create, maintain and develop systems of social security and define their characteristics. This is done by determining the social risks and the persons covered. On this basis a constitutional right to social security is acknowledged.

This right is very often embedded in a social insurance relationship between an individual and public administration based on residence or employment. This right does not give rise to specific entitlements.[7] From this follows clearly that legislation has a broad range of discretion as to how to create, establish, delineate and develop the social security system. Nevertheless the constitutional guarantee has a substantial impact, as it stabilises the institutions built to establish social rights. But it does not mean that the given social security legislation should be set in stone for ever as unchangeable rules. Changes are lawful if they are proportionate, reasonable, predictable and fair. Changes in social security legislation should above all rebalance returns and charges between the

---

[6] Frans Pennings, 'The Meaning of International Standards in Social Security', in Jef van Langendonck (ed.), *The Right to Social Security* (Intersentia 2007) 3; Ulrich Becker, Frans Pennings, Tineke Dijkhoff (eds.), *International Standard-setting and Innovations in Social Security* (Kluwer Law International 2013).

[7] Article 41 of the Czech Charter of Fundamental Rights, Article 131 of the Latvian Constitution and Article 41 para. 4 of the Swiss Constitution.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

beneficiaries and the contributors – as a matter of intergenerational fairness. The impact of the demographic changes in society and on the performance and financing of social security can be readjusted. A reduction of the benefit level can be justified by the prospect of lowering charges for subsequent generations.

So, only in very rare cases of an unbalanced and not proportional retrenchment of benefits was a violation of the right to social security observed.[8] The explicit constitutional right to social security is not the only means to protect social rights. Also the property clause or the rule of law[9] are taken as alternative instruments to protect social rights on the constitutional level. In contrast to the classical conception of property, social rights lack any possessive element. This element is criticised as giving the owner of things also power above human beings, if they work with the objects for the owner. If social rights are seen as property, the emphasis is given to benefits, established in social security on the rule of law. This system is built on trust, and this requires continuity of social security systems. This guarantee is given by the Constitution. And even in the absence of a specific constitutional guarantee of social rights, they are protected by a plethora of constitutional principles, e.g. equality, privacy, the protection of life, liberty and estate.[10]

III. HUMAN RIGHTS' INTERNATIONAL TURN

III.i Social Security Rights and Social Justice

Social security benefits should deepen social justice. This concept, however, is controversial and difficult to grasp. Social justice has to safeguard human dignity, equality and individual freedom. Human dignity is based on the insight Hannah Arendt[11] described when analysing totalitarian governance that each individual has a right to have human rights stemming from the dignity of each human being. So, human dignity is not a human right itself, but represents the overall justification for human rights. Universal human rights are to underpin the dignity of each human being.

Thus, all human beings as created equal are to be respected and as to this are to be treated as equals – despite their enormous differences in reality. The principle of equality of rights neither denies the differences between human beings as to their characteristics, virtues, talents, performances and achievements, nor emphasises equal results in social life.[12] To the contrary, the market is built upon differences between the participants, because only differences allow the exchange of goods and services on the market. But upon the equality of rights of each one each functioning market is built, as

[8] Constitutional Court of Romania decision no 264, 20 March 2007; Decision no 82, 15 January 2009; BVerfGE 100, 138.

[9] Above all in Ireland and the North European countries.

[10] Eberhard Eichenhofer, 'Constitutional Guarantees of Social Protection', in K Ketscher et al (eds), *Velferd og rettferd, Festskrift til Asbjorn Kjonstad, 70 ar* (Gyldendal Juridisk 2013) 127; see also G Katrougalos, Chapter 4 in this volume as to recent Court interventions on the basis of constitutional risks.

[11] Hannah Arendt, *The Origins of Totalitarianism* (Harcourt Brace 1960).

[12] Bob Hepple, *Equality. The New Legal Framework* (Hart Publishing 2011).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

it gives open access to each one without hindrance due to personal characteristics. But such market-driven social life is based on competition and this brings about different results for the participants in the market due to their differences in abilities and thrift, chances and efforts. So, despite the fact that equality of rights is a precondition of the market, its outcome is not equally allotted to the various human beings, but there are remarkable differences due to circumstances within or beyond the individual control of the competitors.

Not all differences are unjustified. To the contrary, some of them are to be regarded as fair, such as the remuneration for ambition and devotion, talent and good luck, a high level of education or a special ability. The welfare state does not wipe out these differences, but quite to the contrary, it profits from them, as each productive society is based upon diversity of people and means to draw economic advantages from the different outcomes of different people. The welfare state is not keen on making everybody or everything alike and the society a homogeneous one. Therefore, the ideal of the welfare state is equality, established on the basis of diversity among human beings, which are entitled by the basic human rights to develop themselves as free individuals. In a welfare state legal equality is not enough to safeguard material or social equality. This formal equality is the backbone of the market: but human life is not a race! Competition and struggling for survival are neither the only, nor the ultimate, targets of social life, they are not more than a technical means to draw social profit from human diversity and differences. So, the welfare state embeds social competition into a social structure of human solidarity. This is done in order to cope with human diversity which stems from differences which are beyond individual control: good or bad health, committed or disinterested parents, stimulating or boring education, good luck or pity – no human being is just the product of her- or himself, but at the same time everyone's life depends on certain social conditions that cannot be influenced by the individual.

The welfare state copes with the challenge of diversity among human beings due to conditions beyond their control, as they are supposed to work and in such activity are exposed to risks embedded in the working life of each individual: sickness, work accident, professional diseases, invalidity, unemployment, old age, death of the spouse or parent. As these risks are not adequately, if at all, covered by the market, it is up to society to make social security become an effective instrument of risk management.

Social security strengthens the freedom of the individual, whenever independent life is jeopardised by social risks. Social justice is the aim of social security benefits, which organise social solidarity. They are based upon the market, but safeguard human dignity also to those who are – through no fault of their own – unable to organise a living in human dignity. Social benefits emerge from social rights. The idea of social justice is translated into 'stake-holding'.[13] It emphasises equal opportunities for all the members of a given society; everyone should have the chance of a fair share – not on the basis of

[13] Bruce Ackermann and Anne Alstott, *The Stakeholder Society* (Yale University Press 1999); Simon Deakin, 'The "Capability" Concept and the Evolution of European Social Policy', in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 3 ff.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

a handout, but as a social right. So, the concept of social justice is directed and verified by social rights.

The idea of social rights[14] is based on a double critique civil human rights, which are embedded in the idea of 'negative freedom'[15] and the principle of formal = legal equality. Social rights are the reaction to a profound challenge. 'Equal liberty before formally universal laws is no fair guarantee of a common opportunity for access to the good life.'[16] Social human rights are central to establishing a society based on fairness. 'The main idea is that society is rightly ordered, and therefore just, when its major institutions are arranged so as to achieve the greatest net balance of satisfaction summed over all the individuals belonging to it.'[17] 'Social rights are inspired by the idea of positive "freedom". The notion of freedom as effective power to achieve what one could choose is an important part of the general idea of freedom.'[18] The additional component to justify social rights is the idea of equality of freedoms in the sense that freedoms are to be safeguarded only if each human being can enjoy her or his freedoms. Equality and non-discrimination are not identical:[19] each equality or liberty (égalité, liberté) brings about inequality, and not all of them are illegitimate. Non-discrimination laws are to sanction illegitimate differences.

III.ii Human Rights as International Principles

The Universal Declaration of Human Rights was the immediate answer to the atrocities of World War II: persecutions, mass murders, expulsions and forced labour, racism, sexism, elitism and any lack of empathy and compassion for 'aliens' who were regarded as 'enemies'. Driven by the intention to establish a lasting peace based on human rights, it had been stipulated that the Universal Declaration of Human Rights would bring about after a 'just war' a 'just peace'.

---

[14] Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights* (Hart Publishing 2007); Gerald J Beyer, 'Economic Rights: Past, Present and Future', in Thomas Cushman (ed), *Handbook of Human Rights* (Routledge 2012) 291; Grainne de Burca and Bruno de Witte (eds), *Social Rights in Europe* (Oxford University Press 2005); Asbjorn Eide (ed), *Economic, Social and Cultural Rights* (Martinus Nijhoff 2001); Cecile Fabre, *Social Rights under the Constitution. Government and the Decent Life* (Oxford University Press 2000); Malcolm Langford, *Social Rights Jurisprudence* (Cambridge University Press 2008); Matti Mikkola, *Social Human Rights of Europe* (Legisactio 2010); David A Shiman, *Economic and Social Justice, A Human Rights' Perspective* (Human Rights Resource Center 1999); Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009); Iris Marion Young, *Justice and the Politics of Difference* (Princeton University Press 1990); Jeff King, *Judging Social Rights* (Cambridge University Press 2012).

[15] Isaiah Berlin, *Two Concepts of Liberty* (Oxford University Press 1958); Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press 1969) 118.

[16] Neil MacCormick, 'Legal Right and Social Democracy', in Neil MacCormick (ed), *Legal Right and Social Democracy, Essays in Legal and Political Philosophy* (Oxford University Press 1982) 10.

[17] John Rawls, *Theory of Justice* (Oxford University Press 1971) 22.

[18] Amartya Sen, *Inequality Reexamined* (Russell Sage Foundation 1992) 69.

[19] Jean-Francois Cesaro, *L'égalité en droit social* (LexisNexis 2011).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

The Universal Declaration of Human Rights was meant as a declaration of principles to echo the motives for which the Allied forces fought the war they finally won, and which should be respected globally after the War. Based on the conviction that mass unemployment and mass poverty gave rise to Nazism, Article 53 of the UN Charter declares that the raising of standards of living, full employment and social and economic progress based on international co-operation among all states should be the central goals for a post-War international order. Under the Universal Declaration of Human Rights the states are sovereign, but they are committed to respect the Universal Declaration of Human Rights' principles as their 'international bill of rights'.[20] This declaration 'is not a treaty, it is not an international agreement, it is not and does not purport to be a statement of law or legal obligation. It is a declaration of basic principles of human rights and freedoms… a common standard of an achievement for all peoples and all nations'.[21]

The Universal Declaration of Human Rights is inspired by a new view of human rights, which is radically different from the one that prevailed when human rights had been initially established in the USA and France by the end of the 18th century. At that time, human rights were 'citizens' rights' or, in French, *droits de l'homme et du citoyen*.[22] Due to their conceptual basis as civil rights they were reserved to the property owners who took part as entrepreneurs in the market. Due to this delineation the original human rights were privileges in a literal sense for a very few male citizens who had sufficient assets to lead, as self-employed, an economic life in full independence from others. Women, workers, slaves and all foreigners were neither conceived of as citizen, nor entitled to human rights. In this thinking, the human rights were elitist, selective and restricted privileges of a nation state for the economically leading class of nationals, whereas the mass of the population should and could not draw any support from the enactment of human rights.

But the history of the 19th and 20th centuries was a process of emancipation, i.e. driven by a constant process of broadening the personal scope of human rights. After a long and violent phase of social struggle and unrest, which brought societies to the brink of social revolution, a history of emancipation of the great majority began. They were up to this moment deprived not only of human rights, but of rights altogether. Emancipation brought to slaves the abolition of slavery, the full integration of the dependent workers in both civil society and the legal system – the latter by incorporating dependent work in the legal context of contract work and the establishment of enforceable public labour protection as to the worker's health and safety – and finally the equal treatment of men and women in state, society, family and labour law.

All these historically profound changes are reflected in the Universal Declaration of Human Rights, above all as to its personal and substantive scope, where these deep and important changes are reflected. Compared with the human rights proclamations of the past, the international human rights of the Universal Declaration of Human Rights are universal as to their addressees and the freedoms granted. As all human beings benefit

---

[20] Mary Ann Glendon, *A World Made New* (Random House 2001).

[21] [1948] 19, 494 *Department of State Bulletin* 751.

[22] Bertrand G Ramcharan, 'Norms and Machinery', in Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations* (Oxford University Press 2008) 443.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

from human rights, irrespective of gender, nationality or civil status, the concept of national citizenship – one crucial for the formation of human rights in the national context – loses its relevance, as citizenship is replaced by other criteria, which are independent from one state. By the international human rights' turn the nation states change their role profoundly; they are no longer to be regarded as independent communities – isolated from one another – but dependent agencies as integral players in the international world of interrelated states.

Such a broad understanding of human rights is supported by anti-discrimination rules. They not only further and deepen equality, but help also to make human rights become effective for everyone – irrespective of gender, ethnic origin, social status, disability and age. Those provisions do not violate human rights as critical comments on those laws had been made upon their implementation. At the same time, they accompany the transition from a traditional reduced and narrow understanding of human rights to the open-minded and wide understanding established by the Universal Declaration of Human Rights.

The human rights in the Universal Declaration of Human Rights also have a wider content than previous enactments. The examples given by the Constitutions of Mexico (1917) and Germany in the Weimar Republic (1919) and Finland (1919, 1995) had been taken over by the Universal Declaration of Human Rights, when it incorporated profound, social rights – rights to work, education, health, assistance, accommodation and social security – as core human rights on the same level and with the same rank as the classical civil and political human rights.

By this enlargement of the scope of human rights the substance of human rights legislation was widened beyond the traditional spheres of civil and political rights.[23] It underlines the overall importance of social institutions to foster social integration. States are mandated with the formation and development of social policy institutions because of their outstanding importance in fostering social integration and human dignity. Social human rights have an important role to play in improving the social conditions of human existence for the working population and all the vulnerable groups in a market society based on wage-labour.[24] The implementation of these rights not only puts social rights of the different states on the same international level, but it also – by doing this – revises international economic law.

III.iii Social Security and the Nation State

A welfare state is aimed at the well-being of each citizen or denizen. So, in such an arrangement the state has an overall important role to play. The state has not only to defend civil liberties and sanction those persons who commit violations. If good health, the relief of poverty and the full participation of each one in the labour market become matters of public concern, the public administration has to safeguard these rights. So, the welfare state stands for big government, a strong and not a weak state, ready to intervene whenever social shortcomings become visible, and keen on organising a

[23] See Chapter 5 in this volume.

[24] Christine Kaufmann, *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law* (Hart Publishing 2007).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

society in line with high social targets and ideals. So, within a welfare state, government, legislation and administration has a leading role to play. This implies high taxes, a substantial share of public spending and a strong and costly public administration.

For the welfare state democratic governance seems not to be a prerequisite, as also authoritarian regimes do and did have a broad welfare agenda. But nevertheless, democratic governance coincides with the aim of the welfare state most as its major aim to improve the living conditions of the greatest number of the population coincides with the principles of the universal vote, which characterises democracy. As welfare states intend to distribute income, they levy taxes and contributions from income and capital. So, despite the fact that the welfare state regards itself as a benevolent state, it has to take from the many to give to others. To make this redistribution acceptable to all, democratic governance is the best way to legitimise the transfer. So, there is under the perspective of legitimising welfare transfers a bias towards democratic governance.

Bringing about social integration is closely related to another basic function of the state, i.e. to safeguard individual rights – irrespective of whether they are to be characterised as civil, political or social rights. Traditionally the state has to defend, define, protect and effectuate human rights. The state has to protect individuals collectively and to organise their joint living within a given society. By social rights the state and the individuals are tied by a relationship of mutual support. Social rights are, hence, a means to establish a community among the individuals living in a given society.

This community – formed by the welfare state – is not primarily directed towards the citizens, but towards the employed persons and the denizens, as systems of social protection integrate persons on the basis of their employment or residence in a given society. The citizens of a society, who are working and living abroad, are not covered by the institution of the welfare state.

So neither nation-building, nor the idea of social citizenship[25] and therefore also not the idea of democracy can give any justification for the welfare state – despite the fact that these thoughts play an important and ongoing role in the political rhetoric, which is driven by a widespread nationalist undertone. This legacy stems from the formative era of the modern welfare state, which was indeed the period of wartime, and had also a strong justification in the efforts undertaken to support veterans and victims of war by society at large. So, from a historical and political point of view the welfare state can be regarded as the benevolent type of independent nation state, which transforms society into a coherent community. In this tradition the status of the citizen resumed a key role in the context and definition of social rights.

Under the conditions of international alliances – in Europe, Europeanisation – or the emerging global governance, all the welfare states became more and more open to one another. If access to the different states is free without any restrictions, also social rights can emerge by virtue of work or residence. Social welfare states are now coordinated on an international level by social security agreements or within the EU by

[25] For these questions, see Chapter 2 in this volume. A good analysis of the multifaceted concept of citizenship is given by Linda Bosniak, *The Citizen and the Alien. Dilemmas of Contemporary Membership* (Princeton University Press 2008).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

EU legislation. So, instead of citizenship, denizenship becomes the key justification for the acquisition of social rights.

IV. SOCIAL HUMAN RIGHTS

IV.i Dimensions: Work, Assistance, Health, Accommodation and Social Security

The fundamental human rights to work, assistance, education, housing, health and social security are enshrined in Articles 22–26 of the Universal Declaration of Human Rights. Civil and political rights became a central issue in the formative era of the 18th century, when the market society gained ground and democracy become the prevailing model for governance. Social rights were the ultimate outcome of the initial era of industrialisation, which made social inequalities and mass poverty evident and undermined social cohesion, which led industrialised societies to the brink of social revolution. They avoided this peril between the late 19th century and the 20th century by implementing social reforms such as to labour rights, trade union law, collective bargaining, public health and public schooling, an extension and further systematisation of poor law and the creation of social security. Despite their old roots in the late 18th century, when they were envisaged by Thomas Paine in his book, *The Right of Man*[26] and for the first time formally acknowledged by the French General Declaration of the Rights of Men and Citizens adopted in 1793 in the French National Assembly, their constitutional acknowledgment became possible only after the legal institutions were established which could make the social rights effective and relevant, so that also corresponding social rights could effectively be proclaimed.

In the academic dispute on social human rights, there is strong doubt as to whether social rights could ever be possible as human rights. If human rights are regarded as guarantees under natural law, meant to identify immunities under state legislation and the definition of negative freedoms, social rights could never be fundamental social rights, as they could not meet any of these requirements. Hence, all social rights lack any naturalistic flavour as they are based on social institutions, to be made by political actions, and they have to create positive freedom, i.e. possibilities to act. But is the legal character of human rights in this alleged picture adequately sketched?

All human rights have to establish freedom within a society. Therefore, they never define spheres of natural freedom. Human rights are not about human nature, but about human society! As they are part of the law, they have to play a leading role within the law! It is, hence, a misconception of human rights to conceive them as a part of natural law. All human rights have a societal strand.[27] They became an issue in history, only if social conditions were met, when the freedom of the individual became a subject of

[26] Thomas Paine, *The Right of Man* (London 1791); Gerald J Beyer, 'Economic Rights: Past, Present and Future', in Thomas Cushman (ed.), *Handbook of Human Rights* (Routledge 2012) 292 ff.; David Bilchitz, *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights* (Oxford University Press 2008) 109.

[27] Beyer (n 26) 300; Sandra Fredman, *Human Rights Transformed* (Oxford University Press 2008).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

dispute within society. The freedom of belief became a controversy in society under reformation when different confessions emerged. The freedom of expression is only important under the assumption of a public sphere, based on unhindered communication and exchanges of different views. For an individual isolated from the rest of society, there is no audience. So to this person, the freedom of expression is without any importance. The right to marriage requires a partner: if there is no one to marry, the right would be without any importance. If so, human rights are addressed to the members of the human species not as human beings, but as members of the human society of women and men which organises their joint living based on market exchanges in a democratic political order framed by a comprehensive welfare state.

So, as human rights in general far from single out spheres of natural freedom in a world determined by politics and big government, all of them are based on social institutions, made by political and legal actions. The freedoms safeguarded by human rights do not imply the omission of state formalities but the adaptation of those to the corresponding freedom. The freedom of association is, thus, not violated by the provision of state formalities on the formal requirement of registration in the event of the foundation of an association, but each association has to be publically registered irrespective of the purpose of the association or the by-laws agreed upon by its members. So all human rights – the civil and political rights herein included – depend on a plethora of societal, political and social prerequisites. Therefore, also the social human rights should and can be qualified as their dependence on state legislation and public implementation is not atypical of human rights but in general complies with them as to being legally respected, socially protected and politically fulfilled. Social human rights can even more provide a good illustration of how these three dimensions of all human rights grew in importance and gained ground.

A further criticism against social human rights is their alleged lack of justiciability.[28] Indeed their terms are vague and unclear as to their meaning and content. And it is on their basis difficult to predict what a beneficiary really can count upon. These rights are not only open to predicting what a beneficiary might specifically expect, nor is this openness of the right a characteristic which is observed only in the context of social human rights. As to their general and abstract content, all human rights are unclear and, hence, not easily grasped. Which actions are permitted under the freedom of belief, expression or of art? It is in each case quite difficult to find out – as the constitutional terms are broad, vague and open to interpretation. But this problem can and will be solved on the basis of case law, which has been established for the social human rights to a certain degree already as it was elaborated for a longer period of time for the classical human rights. So, in any respect case law and many existing fundamental standards stemming from such law might help to solve the problem of unclear human rights.

Also the quite frequently raised argument that social human rights are said to be unenforceable disregards the potential that legislation on human rights has developed. So the criticism seems to be a little bit circular, stating as an alleged consequence what

[28] Daphne Barak-Erez and Aeyal Gross (eds), *Exploring Social Rights* (Hart Publishing 2007); Malcolm Langford (ed), *Social Rights Jurisprudence* (Cambridge University Press 2008).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

the argument tries implicitly to hinder. So the alleged shortcoming comes from the lack of willingness to take the existing law enforcement mechanism for granted.

And, finally, there is no profound difference to be noticed between the negative and the positive freedom,[29] because all freedoms are at risk of being violated irrespective of their negative or positive dimension. Each violation of both positive or negative freedom indicates a lack of respect, a lacuna in protection or a deficit in the fulfilment of a human right. So, there is no fundamental objection against the adequacy and legitimacy of social human rights.

IV.ii Structure of Social Rights

IV.ii.a Addressees of social rights

From an international law perspective, social rights are addressed towards the state. But from the perspective of national law it is not primarily the state, but other individuals, which are quite often organised in social intermediaries such as social insurances, local communities or members of the workforce of a country, who are to make social rights become effective. This direction and determination of a social right becomes obvious for the right to work. As it is enacted as the right to work with freedom of choice of employer,[30] it requires that a worker can find an employer, willing to employ him or her and to collaborate. The rights to decent housing or good health care do not imply that the state owns houses or has health care facilities at its disposal. These rights mean, however, that if these items are under private ownership, also house-owners, hospitals or medical doctors are bound to make the social rights become effective. Social rights are always included 'in social contexts that enable, hinder or preclude the realization of self-reliance in varying degrees'.[31]

The right to social security depends on solidarity established within the corporation organised as a social security institution apart from the solidarity prevailing in a state. Those who are covered by social security are not identical with the citizens of a given state, as social security covers also non-nationals due to their work or residence. This difference unveils a profound lacuna in the prevailing theory on 'social citizenship',[32] which is so popular in the English-speaking world, as it clarifies that social security does not coincide with the idea of national solidarity! It has much more to do with the solidarity among those who are working and living in the same country. This difference matters in an internationally open society.

The social security system creates a framework of redistribution among the insured persons. Social rights are based on obligations and commitments imposed in a given society on its members. This role is not embedded in nationality but in residence and

---

[29] Sandra Fredman, *Human Rights Transformed* (Oxford University Press 2008); Eberhard Eichenhofer, *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht* (Mohr Siebeck 2012).

[30] Art. 23 Universal Declaration of Human Rights; an example of that right is given by Judith Asher, *The Right to Health. A Resource Manual for NGOs* (Martinus Nijhoff 2010).

[31] Gerald J Beyer, 'Economic Rights: Past, Present and Future', in Thomas Cushman (ed), *Handbook of Human Rights* (Routledge 2012) 291 at 301.

[32] Thomas Humphrey Marshall, 'Citizenship and Social Class' in Thomas Humphrey Marshall and Tom Bottomore (eds), *Citizenship and Social Class* (Pluto Press 1992) 3 ff.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

work within a state. This integration implies not only entitlements, but imposes at the same time commitments as to finance and facilitates the system to fulfil its protective function and make, thus, social life become an effective and productive one.[33] 'The importance of rights to welfare … lies not only in the guarantee of a basic standard of living per se, but also … in the fact that the latest the fullest enjoyment of the civil rights of citizenship is dependent on welfare if these rights are to be more than formal and real guarantees'.[34] In this respect, social rights are important to create the preconditions under which civil society and democracy can flourish.[35] Social rights enable human beings to use their civil rights and give democracy an 'added potency'.[36] 'The idea of rights of welfare has also become linked with the idea of social justice' and hence 'confer[s] a social and economic state outside the market'.[37]

It 'involves the idea of a just distribution of resources and, therefore, a correction of the market outcomes. It also entails the idea that citizens' obligations do not mean mutual non-interference, for citizens have positive obligations, to provide resources for welfare which can be collected coercively through the tax system'.[38]

IV.ii.b Social rights and social duties

Social rights encompass rights of action and rights of recipience: thus giving benefits as imposing burdens implies questions of distributive justice. This is a common feature of all social protection systems. The Beveridge Report stated that 'social security must be achieved by co-operation between the state and the individual'.[39] 'Rights of action are the absences of obligation. On the other hand, rights of recipience of a person are rights which correspond to the duties of another person or people. … All moral rights of recipience can be expressed in terms of duties, not all duties are expressible in terms of rights'.[40]

Social rights unveil as their main characteristic the necessary interrelation between rights and duties. This context is pointed out by Article 29 I of the Universal Declaration of Human Rights: 'Everyone has duties to the community in which alone the free and full development of his personality is possible'. So, all human rights of recipience correspond to duties of other human individuals.[41]

---

[33] Jef van Langendonck, 'Freedom and Social Security', in L Mitrus (ed), *Liber Amicorum Prof Dr habil. Andrzej Marian Swiatkowski, Studies in Labour Law and Social Policy* (Rocznik 2009) 311 at 320.

[34] Neville Harris, 'The Welfare State, Social Security, and Social Citizenship Rights', in Neville Harris (ed), *Social Security Law in Context* (Oxford University Press 2000) 3 at 23.

[35] Ibid 23.

[36] Ibid 31.

[37] Raymond Plant, 'Citizenship, Rights, Welfare', in Jane Franklin (ed.), *Social Policy and Social Justice* (Polity 1998) 57.

[38] Ibid.

[39] Grainne McKeever, 'Balancing Rights and Responsibilities: The Case of Social Security Fraud' (2009) 16 *JSSL* 139 at 141; Lucy William, *Philosophy of Private Law* (Clarendon Press 2007) 333.

[40] Hugh V McLachlan, *Social Justice, Human Rights and Public Policy* (Humming Earth 2005) 30.

[41] Ibid., 53; Sandra Fredman, *Human Rights Transformed* (Oxford University Press 2008) 65, 204.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

The right to social security unveils the conditionality[42] of social rights in a double sense: firstly, these rights depend on qualifying conditions elaborated by law and to be fulfilled by the beneficiary's living circumstances and assessed as being fulfilled by the administration; and secondly, the beneficiary is exposed to series of actions in order to receive benefits, e.g., as an unemployed person actively to search for work or as injured person to be open to medical treatment, rehabilitation or vocational training. Benefits depend on administrations, which are capable of effectively charging the insured persons with the payment of contributions. Social rights are characterised by a collective component, they go hand in hand with social responsibilities – 'No rights without responsibilities!'[43]

In contrast to ecological rights, social rights are the rights of individuals, which are embedded in collective relations, which create rights and duties; whereas ecological rights are addressed primarily to certain groups of human beings, social rights intend to safeguard the well-being of each individual. Social security illustrates this clearly. In the case law of the European Court of Human Rights the right to social security assumes the legal character of property.[44] This shows that social and civil rights are similar.

IV.ii.c Social rights depend on legislation

The conditions for social rights are to be created by acts of legislation. The first and most fundamental prerequisite is to make social rights feasible; this requires the establishment of institutions to administer and police social rights by acts of legislation. A series of requirements stem from these circumstances, which must be respected in order to adapt the right to the needs of the beneficiaries. The stakeholders – trade unions, employers' organisations and non-governmental organisations – should be integrated in the legislation to give them a voice. The debate on social legislation should be profound and accompanied by a public discourse in order to make the public and the beneficiaries aware of the rights to be enacted.

Additionally, social rights depend on a plethora of social and institutional conditions, also to be established by law. The right to work is bound to a whole range of potential employers and a public system of placement, a policy directed towards full employment – with many instruments on training, assistance and, if necessary, public employment and labour legislation. The same is true for the rights to decent housing or health care. All these human rights are to be built on the organisational capacity of the state, to regulate the labour market, housing and health care. The implicit condition, on

---

42 Eberhard Eichenhofer, *Recht des aktivierenden Wohlfahrtsstaates* (Nomos 2013).

43 Anthony Giddens, *Beyond Left and Right* (Polity 1994) 65.

44 *Koua Poirrez v France* Appl no 40892/98 (ECHR 30 September 2003); *Gaygusuz v Austria* Appl no 17371/90 (ECHR 27 September 2011); *Stec v United Kingdom* Appl nos 65731/01 and 65900/01 [2005] 41 EHRR SE 295, 51: 'In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right'; Mel Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' (2009) 16 *JSSL* 120.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

which the right to social security is built, is organisations establishing a relationship between a huge number of individuals confronted with the same social risk and the protection is based on solidarity. 'Solidarity is the child of interdependence, although not interdependence alone.'[45]

A law strengthening social solidarity constructed 'a realm of social rights, of moral equality and identity among all citizens, created by modern society's interconnectedness'.[46] Social rights, thus, give shape to this interdependence among the covered persons, working or living in a given state. Due to this they do depend on institutions, which have to be established by acts of state legislation and are to be brought forward by the state and are accompanied by a bureaucracy. It foresees and attributes to those entitled a fair share of the outcome of the social product.[47] So, the welfare state cannot be adequately understood without accepting bureaucracy as its backbone.

In this respect the fundamental social rights can be analysed as provisions to institute and establish institutional administrative frameworks, capable of making individual social rights become effective. These rights impose many commitments on the legislator. Thus, the primary addressee to bring about and make social rights matter is Parliament. This is free to decide on how the social goal is best achieved; but under a guaranteed social right it is not free to abstain from action. Thus, it has to make sure that individuals entitled to social rights can achieve a societal position in line with the given legal provision.

If these commitments are based on international law, the implementation of specific measures is imposed on the state. This leads to the impression that international social rights might undermine both democracy and sovereignty. But this is a double misconception: firstly, because all human rights limit democracy as they identify spheres of action beyond the discretion by the majority; and finally, under the post-World War II order of states, all states are deeply embedded in international and European law. Hence, all states have definitely lost their sovereignty, above all as far as human rights are concerned.

The fact, that all human rights are based on social circumstances and depend on legal provisions giving them shape and structure shows clearly that not only social human rights, but all fundamental civil and political human rights, have state power as their implicit precondition.[48] The civil rights leave the creation of individual autonomy within a political community and political rights are made to give the individual a say in forming and executing state power. The latter are not meant to establish a political order apart from the state, but to integrate the citizens into the making of state policy in the framework of a democratic government within a given state.

So again, civil and political rights cannot be conceived as the legal status of an isolated individual living apart from both the state as society but as a means to frame –

---

[45] Peter Baldwin, 'The Politics of Social Solidarity. Class Bases of the European Welfare State 1875–1975' (Cambridge University Press 1990) 32, 33.

[46] Ibid 35.

[47] Jürgen Habermas, *Faktizität und Geltung* (Springer 1992) 104 ff.

[48] Chapter 5 in this volume; even in the 1793 French version of the Declaration of Human and Civil Rights it was definitely expressed: 'La déclaration des droits contient les obligations des législateurs' (the declaration of rights implies the obligation to enact laws).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

shape, limit and legitimate – the execution of state power in relation to individuals living in a given society. In this context the state is not bound to abstain from action, but to take measures. Parliament is, however, not only bound by these rights as such, but it is bound to find also the proper ways and means to make these rights become effective administratively and financially. So, human rights impose on the state the burden to make human rights become both effective and protective.

IV.iii Justiciability and Enforceability of Social Rights

'Scepticism directed against the potential justiciability of economic, social and cultural rights is commonplace, not only in the international law sphere, but also in many domestic law systems.'[49] 'A standard objection to social rights is that they rest on the concept of needs, which is notoriously difficult to grasp, mostly because they are impossible to distinguish from preferences, so that one cannot determine with precision what really counts as needs.'[50]

Human rights as part of international law serve as guiding principles for domestic politics; they are supported by monitoring mechanisms established on the global regional level.[51] Based on the declarations of principles laid down in the Universal Declaration of Human Rights, since the 1990s a transnational '*jus commune* of human rights' has begun to emerge.[52] The Universal Declaration of Human Rights principles gained ground as a persuasive authority, it has been reproduced and, thus, strengthened by similar guarantees on the regional level. This development revives the idea of natural law, which was the initial theory upon which international human rights had been established. As the Universal Declaration of Human Rights principles became binding provisions under UN law and because Article 103 of the UN Charter prevails over other international provisions, international human rights have a binding effect on the states.

Do the various social rights give entitlements in substance? Could one ever imagine being entitled under a right to work to a specific workplace, under the right to health to be in good health for lifetime, and what about a right to welfare for the able-bodied. Are they entitled to be on the dole for life? So, one can not only ask: 'Do economic and social rights only exist on paper as part of treaties and constitutions to which governments often pay lip service at international fora?'[53] At the same time: are the

---

[49] Yuval Shany, 'Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights', in Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 77, 78; Diane Roman, *La justicibialité des droits sociaux: Vecteurs et resistances* (Editions Pedone 2012).

[50] Cecile Fabre, *Social Rights under the Constitution. Government and the Decent Life* (Oxford University Press 2000) 33.

[51] Judith Asher, *The Right to Health. A Resource Manual for NGOs* (Martinus Nijhoff Publishers 2010).

[52] Olivier De Schutter, *International Human Rights Law* (Cambridge University Press 2010) 31 ff.

[53] Fons Coomans, 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Context', in Fons Coomans (ed.), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems* (Intersentia 2006).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

social rights in the last instance expressions of a Utopian thinking, which is not appropriate to the brutish world of competition, markets, in short, the world we are living in?

'Human rights are difficult to define, but in general terms, they are regarded as fundamental and undeniable claims or entitlements which are essential for life as a human being.'[54] It is true that when it comes to defining the concept of welfare, the latter assumed different forms in history and in comparative perspective a plethora of legal organisations of welfare is to be observed. The same is true when it comes to social security in which the conventional doctrine discerns an egalitarian Nordic, a conservative central European and a liberal, British approach.[55]

There is no doubt about the open and abstract character of human rights guarantees, but this is not peculiar to social rights, as it characterises all the provisions on human rights! All human rights are vague and 'all human rights are "social" by nature'.[56] Social rights are based upon state power, as they depend on the ability of the state to build legal institutions by political measures and legal action. The social rights need public support, as they create individual rights by imposing obligations to others; the social contributions to pay are made mandatory to make the social rights become effective.

Thus by state legislation social human rights, enshrined in international, European and national constitutional law, are to be implemented by law. In a legal system based upon the rule of law, each entitlement to social welfare or social security has to be submitted to review by independent tribunals, which have to assess whether an administrative decision has been taken in accordance with the legal provisions.

In their role as part of an interventionist state, social commitments are becoming leading imperatives for legislative actions. It is a generally accepted principle that social rights are to be created in relation to the economic potential of a state and that the development of social rights is to be realised progressively.[57] Hence, the state is also committed to protect those persons who cannot take part in the market due to individual restraints or deficits. The de-commodification of social services or goods and the payment of cash transfers is the sociological expression of delivering these items by means of law, instead of purchasing them on the market. The rationale behind the social strategy is to help those who cannot help themselves.

This is very often done by virtue of utilising market forces to meet social ends. So, state guarantee of social rights is possible in market economies under the assumption that each market economy is necessarily to be embedded in a publicly created legal order, determined to facilitate the market forces to cooperate and to protect the needy who cannot actively take part in the market process.

---

[54] Manisuli Ssenyonjo, *Economic, Social and Cultural Rights in International Law* (Hart Publishing 2009) 9.

[55] Gøsta Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Cambridge University Press 1990).

[56] Daphne Barak-Erez and Aeyal M Gross (eds), *Exploring Social Rights: Between Theory and Practice* (Hart Publishing 2007) 7.

[57] Gerald J Beyer, 'Economic Rights: Past, Present and Future', in Thomas Cushman (ed), *Handbook of Human Rights* (Routledge 2012) 291, 300; Olivier De Schutter, *International Human Rights Law* (Cambridge University Press 2010) 740 ff.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

Social rights bring about a judicial incrementalism[58] as they are to be defined under conditions of uncertainty, might have an important allocative impact and have significant implications for a large number of people. From this stems an attitude of judges to outline social rights in a general and tentative manner, to make Parliament implement appropriate rules and to avoid explicit delimitations, assessments and sanctions.

V. THE HUMAN RIGHT TO SOCIAL SECURITY AS INTERNATIONAL AND EUROPEAN GUARANTEE

V.i United Nations

In the United Nations the right to social security becomes important (a) under the Universal Declaration of Human Rights, (b) in the context of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and (c) in the ILO legislation.

V.i.a Universal Declaration of Human Rights

Under Article 22 of the Universal Declaration of Human Rights 'everyone, as a member of society, has the right to social security'. This provision is universal as to the entitled persons. If everyone as a member of society has a right to social security, no differential treatment is permitted as to the social status, gender, age, nationality or a disability of the protected individual. All persons living or working in a society are to be included in the social protection system of this country. Nationality, as the link between an individual and the state which organises the protection, has no decisive role to play in the context of protection. The right is embedded in the membership within a society; this does not derive from nationality, but from factors which connect an individual with a state by social links – above all residence or work.

To determine the substantive scope of Article 22 of the Universal Declaration of Human Rights, Article 25 contains an important indication. In this provision at the first level the social human rights to assistance, health and housing are guaranteed: 'Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary services'. Additionally, Article 25 refers to 'the right to security in the event of unemployment, sickness, disability, old age and other lack of livelihood in circumstances beyond his control'. From this follows that the list of social risks mentioned by Article 25 is not limitative, but open to further circumstances beyond personal control.[59]

V.i.b International Covenant on Economic, Social and Cultural Rights

By the International Covenant on Economic, Social and Cultural Rights the principles laid down in the Universal Declaration of Human Rights, which had been understood

[58] Jeff King, *Judging Social Rights* (Cambridge University Press 2013) 293 ff.

[59] Jef van Langendonck, 'The meaning of the right to social security', in Jef van Langendonck (ed), *The Right to Social Security* (Intersentia 2007) 3, 5.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

as principles of morals and ethics and not intended as principles of law, had been translated into a binding, legally enforceable and effective mechanism of public international law. The economic, social and cultural rights, enshrined in the Covenant are made legally binding and the guarantees elaborated become enforceable. As to the two categories of social and civil human rights, there are two covenants established. Both are devoted to the two groups of rights, but both have the same intention of protection. Both covenants are transformed in the legislation of the transforming states as an integral part of their own law.[60]

On this basis Article 9 of the International Covenant on Economic, Social and Cultural Rights reads: 'The States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.' This highlights that social insurance is seen as a means to foster social security.

A Committee on the International Covenant on Economic, Social and Cultural Rights supervises the states on whether their legislation is in accordance with these guarantees. The members of this Committee agreed upon criteria which should lead the interpretation and control of the Covenant. They are explicitly stated in the Limburg principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights (1986)[61] and the Maastricht Guidelines on Violations of Economic, Social and Cultural Rights (1997).[62]

As to these interpretative rules the human rights proclaimed in the Covenant should be emphasised. The states should 'take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realization of such rights' (para 6). The commitment towards the full realisation of these rights is to be done progressively (para 8). A budget lacuna cannot be accepted as an objection for the full realisation of a right (para 10). If social security schemes are to be eliminated, the states have to provide for an adequate replacement. Each 'reduction or diversion of specific public expenditure, when such reduction or diversion results in the non-enjoyment of such rights' has to be 'accompanied by adequate measures to secure minimum subsistence rights for everyone' (para 14 b).

The UN Committee on Economic, Social and Cultural Rights[63] gives a general comment No 19. Therein it underlines that the right to social security stands in relation to the guarantee of human dignity and the other human rights of the Covenant, since without social protection the capacity to realise full Covenant rights would not exist.[64] The right to social security is characterised by three dimensions: it gives access and benefit in cash or kind in the various acknowledged cases of lack of work income; it does not provide for special standards, but leaves it to the states to give shape to this right. And, finally, due to the lack of sufficient protection under social security worldwide, there is still a long way to go to establish social security as a universal

---

[60] John Veit-Wilson, 'Some Social Policy Implications of a Right to Social Security', in Jef van Langendonck (ed), *The Right to Social Security* (Intersentia 2007) 57, 65.

[61] (1987) 9 *Human Rights Quarterly* 121; see Chapter 5 in this volume.

[62] (1998) 20 *Human Rights Quarterly* 691; see Chapter 5 in this volume.

[63] Ibid.

[64] Frans Pennings, 'Historical and Theoretical Background of Standard Setting in Social Security', in Ulrich Becker, Frans Pennings and Tineke Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security* (Kluwer Law International 2013) 15, 16.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

human right. In the light of this experience emphasis should be given to integrating the most vulnerable groups of society into the protection of social security.[65] Special attention is given by the Committee to retrogressions. They are not outlawed, but to be tested on whether they keep an eye on the most disadvantaged groups of society, which are not to be deprived of the protection they achieved previously.[66] This links the International Covenant on Economic, Social and Cultural Rights guarantees with the conventions and recommendations enacted by the ILO.[67]

V.i.c ILO

> The overall objective of the ILO is to obtain social justice worldwide through the promotion of decent work for all. One of the principal means of action of the ILO is the setting of international standards … The standards serve as worldwide agreed guidelines or benchmarks for the adoption of national social policies and when ratified, they prevent countries from backsliding. But more important, once ratified by member states, ILO conventions become binding national law. This is a potentially powerful instrument in global social policy![68]

Social protection has been a central concern of the ILO's activities since its very beginning. As early as 1919 the International Labour Conference adopted in its first session a convention on social insurance.[69] Among the conventions and recommendations on social security, Convention No. 102 is the 'flagship convention',[70] as it includes all the nine branches of social security. Later conventions, e.g. those on pensions (No. 128), health care (No. 130), employment injuries (No. 121) and unemployment benefits (No. 168) set higher standards. Convention No. 157 establishes a comprehensive, all-embracing regime for the social security rights – a protection for migrant works on a global basis.[71]

---

[65] Ibid, 17; Eibe Riedel, 'The Human Right to Social Security, Some Challenges', in Eibel Riedel (ed), *Social Security as a Human Right* (Springer 2007) 17, 22, 26.

[66] Ibid, 26, 27.

[67] Ibid, 22; apart from the ILO activities the UN pursues its own social policy by conventions on the rights of the child ([1989] 1577 *United Nations, Treaty Series* 3), persons with disability ([2006] 2515 *Treaty Series* 3) and all migrant workers and members of their families ([1990] A/RES/45/158); Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press 2009).

[68] Ursula Kulke, Michael Cichon and Karana Pal, 'Changing Tides: A Revival of a Rights-Based Approach to Social Security', in Jef van Langendonck (ed), *The Right to Social Security* (Intersentia 2007) 13, 15.

[69] ILO Recommendations No. 1 (1919), see also Conventions No. 18 (1925), 19 (1925), 24 (1927), 35 (1933).

[70] Ursula Kulke, Michael Cichon and Karana Pal, 'Changing Tides: A Revival of a Rights-Based Approach to Social Security', in Jef van Langendonck (ed), *The Right to Social Security* (Intersentia 2007) 13, 15.

[71] This topic is also dealt with by the International Convention on the Rights of Migrant Workers, see Ryszard Cholewinski, Paul de Guchteneire and Antoine Pécoud (eds), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights* (Cambridge University Press 2009).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

Convention No. 102 does not specifically prescribe the manner in which health care and income security has to be organised by the states. There is no ideal type of policy elaborated which should be adopted by the member states. Instead of this, Convention No. 102 fixes minimum objectives on the basis of commonly agreed principles. It establishes the basis for social protection to be created and upheld and progressively developed by all the ILO member states. These standards refer to the percentage of the population protected: 20 per cent of the inhabitants or 50 per cent of the workers. It requires also a protection of at least three of the acknowledged nine social contingencies, and minimum expectations as to the level, duration and periodical adjustment of the benefits.[72] It anchors a few constructive principles of social security as to the legal guarantee of the rights to benefits, the participation of employers and employees in the administration of the system, and a collective public financing out of taxes or contributions. If the system is financed by contributions the employee's share should not exceed half of the overall costs. In the calculation of this half, employment injury and family benefits should not be taken into account as both fall within the employer's responsibility.

Since 2001 the ILO has undertaken many initiatives to further the human right to social security by giving the debate on international standard setting a new approach: instead of a conventions-based approach a rights-based approach was initiated.[73] This view of social security was proclaimed by the International Labour Conference 2001 and more precisely elaborated in documents such as: *Social Security: A New Consensus*,[74] *Setting Social Security Standards in a Global Society*[75] and *Social Security and the Rule of Law*.[76] The ILO Declaration on Social Justice for Fair Globalization, enacted at the 97th session of the International Labour Conference on 10 June 2008, underlined the double strategic approach for a further deepening of social security protection, both as to the persons covered (horizontal approach) and as to the benefit levels (vertical approach). In 2012, ILO Recommendation No. 202 was enacted to strengthen ILO Convention No. 102 and make the issue become more relevant to the international community.

---

[72] Ibid 16.

[73] Frans Pennings, 'Historical and Theoretical Background of Standard Setting in Social Security', in Ulrich Becker, Frans Pennings and Tineke Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security* (Kluwer Law International 2013) 15, 17; Kari Tapiola, 'Global Standards: The Policy of the ILO', in Ulrich Becker, Frans Pennings and Tineke Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security* (Kluwer Law International 2013) 43.

[74] ILO, *Social Security: A New Consensus* (ILO 2001).

[75] ILO, *Setting Social Security Standards in a Global Society* (ILO 2008).

[76] ILO, *Social Security and the Rule of Law* (ILO 2011).

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

V.ii Council of Europe

Under the Council of Europe's legislation the right to social security is formally established in Article 12 of the European Social Charter as a specific human rights instrument.[77] As to this it is stated:

> With a view to ensuring the effective exercise of the right to social security, the Parties undertake:
>
> 1. to establish or maintain a system of social security;
> 2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
> 3. to endeavour to raise progressively the system of social security to a higher level;
> 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
>   a. equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties;
>   b. the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

This right is supplemented by the right to social and medical help (Article 13 European Social Charter) and to social services (Article 14 European Social Charter). As to Article 12 of the European Social Charter the contracting states who are members of the European Council are to establish and develop a system of social protection, which complies with the ILO standards of Convention No. 102. These requirements are made even more demanding by the European Code of Social Security, which makes higher standards an obligation of the Council of Europe's member states, e.g., to provide for at least six of the nine branches of social security, whereas under the Convention No. 102 three branches suffice.

As to Article 12(1) of the European Social Charter, it is evident that as social security rights are embedded the establishment of social rights of such a system is an indispensable condition. The notion of social security is broad; it encompasses rights to social income and social services.[78] The system of protection is to be established by each state in line with its own priorities. As to the personal scope of protection, a work- or residence-based system can be erected; the decision on the system depends on to the priorities of the states.[79] Article 12(2) of the European Social Charter underlines that an accurate protection of social security as a human right needs, additionally, an

---

[77] David Harris and John Darcy, 'The European Social Charter' (Pail Institute 2001) 153 ff; Olivier De Schutter, 'The Two Lives of the European Social Charter', in Olivier De Schutter (ed), *The European Social Charter: A Social Constitution for Europe* (Bruylant 2010) 11, 29; Lenia Samuel, *Droits sociaux fondamentaux. Jurisprudence de la Charte sociale européenne* (Editions du Conseil de l'Europe 1997) 319 ff.

[78] Matti Mikkola, *Social Human Rights of Europe* (Legisactio 2010) 298.

[79] Ibid 304.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

elaborated statute, which more carefully and substantially identifies the cornerstones of the social security system to be established. As to Article 12(3) of the European Social Charter the system is to be developed progressively, this means bringing social security legislation from a 'lower' to a 'higher' level of human rights protection. But what is 'low' and 'high' in social protection? In the initial phase of the European Social Charter, social security progress was paralleled with economic expansion; under the conditions of a matured system of social protection also the costs and burdens imposed on the active generation as contributors of the social security became an issue. So, social progress means today a balanced system of protection bearable by the society and sustainable for the future generations of beneficiaries. So, the progressive development clause in the provisions is to be interpreted so as to make the social security system of each country keep pace with the development of the society at large.[80]

Article 12(4) of the European Social Charter makes it mandatory for the states to ascertain the right to social security in the international dimension. This encompasses equal treatment of all nationals of different countries and creating provisions to make social security entitlements become internationally effective by exporting benefits in cash, accumulating periods of coverage and protection spent under the legislation of different countries.

A further dimension of the protection of the right to social security in the framework of the Council of Europe's legislation identified in the activities of the European Court of Human Rights, which has to interpret the European Convention on Human Rights. Despite the fact that this Convention is about civil and political human rights, the case law of the European Court of Human Rights shows clearly that also social security rights have a deep link to civil and political human rights, so that these human rights guarantees also strengthen the right to social security.[81]

V.iii European Union

Article 6 of the Treaty of the European Union (TEU) integrates the EU Charter of Fundamental Rights (Charter) into the core of the primary legislation to which it previously belonged as a non-binding document of a more political and moral dignity than legal enforceability. As to Article 51 of the Charter both the EU organs and the Member States are bound by the Charter when applying EU law. So, the provisions of the Charter are not only relevant when assessing the actions taken by the EU, but the Charter binds and obliges also the Member States as far as they administer EU law or implement EU directives into the core of their domestic legislation. Both can happen in social security as to the – relatively few – directives which are relevant to social security and as to the social security co-ordination, whose rules are to be applied by the domestic social security administrations. The Charter provides under Title IV on 'solidarity' a whole range of social human rights (Articles 27 to 38). In Article 34 of the Charter the right to social security is formally stated:

---

[80] Ibid 298, 313, 320.

[81] On the further implications of these rules, extensively Slingenberg, Chapter 3 in this volume.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

1. The Union recognises and respects the entitlement to social security and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.
2. Everyone residing and moving legally within the European Union is entitled to social security benefits and social advantages in accordance with Community law and national laws and practices.
3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

The provision was one of the most controversial of the Charter.[82] The provision is a compromise between more proactive versions and reluctance to safeguard Member States in their autonomy in social policy. Article 34 of the Charter proclaims the principle of solidarity, which is a key principle of the Charter; it also concurs with the commitment of the EU to social targets, social progress, a social market economy and the combating of social exclusion.[83] The EU has to respect social protection as the central institution of the Member States.[84] In addition it imposes on both the EU and the Member States[85] the commitment to give access to social security benefits – irrespective of nationality – also for third states' nationals.[86]

This right is to be guaranteed by the EU and the Member States to everyone. So, one might doubt whether under such a guarantee selective protection in social security – above all as to the economic status as an employee or a self-employed person – is permitted. The conventional explanation that this difference is justified by the different ranges of protective need is not soundly proven, as the vulnerability to social risks is not bound to dependent work, but is also a huge challenge for all sorts of self-employment. So, as to the human rights character of this guarantee, this right has to strengthen the most vulnerable members of a society. Neither distinctions nor omissions are justified when it comes to social protection in the context of the right to social security.

VI. CONCLUSION

The human right to social security is both an integral and fundamental part of human rights legislation. It is an integral part as it coincides with other social rights, and it is

[82] Angelika Nußberger, 'Art. 34 Rn. 8 ff', in Peter J Tettinger and Klaus Stern (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (Beck 2006); Andrea Georgis, 'Artikel 34 No 2, 3, 4', in William BT Mock and Gianmario Denaro (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union* (Carolina Academic Press 2008).

[83] Angelika Nußberger, 'Art 34 Rn 54 ff', in Peter J Tettinger and Klaus Stern (eds), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta* (Beck 2006).

[84] Ibid Rn 59 (Annotation).

[85] Ibid Rn 104.

[86] Ibid Rn 65, 69, 77, 106.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

a fundamental part as it lays the ground for an economically independent life for individuals, even when they are exposed to the vicissitudes of life, i.e., the contingencies that happen because independence is endangered due to living conditions beyond individual control. Social security is an extremely technical instrument and it is, therefore, difficult to grasp, but it is based on the easily understood idea that each one has a right and, hence, is obliged to take part in the formation of social rights.

The incorporation of social rights, i.e. the human rights to work, education, assistance, health and social security, underlines that human freedom is not only protected if the classical civil and political rights – the human rights of the first generation – are safeguarded, but that also the basic needs and entitlements in a work society have to be established, to establish a law which guarantees human dignity – then conceived as the freedom from fear and want. When, hence, assessing the arguments against and in favour of fundamental social human rights, and sketching the various legal foundations of social human rights on the international, national and European level, it becomes clear that social human rights are in line with the principles of human rights legislation in general and, so, they are to implement and strengthen by international adjudication and monitoring. The human right to social security is not only a matter of right, but at the same time it imposes, like all social human rights, obligations on society at large. So like social human rights also the right to social security is based on a mix of rights and commitments both of the beneficiary and of society.

BIBLIOGRAPHY

Ackermann, Bruce and Anne Alstott (1999), *The Stakeholder Society*, New Haven: Yale University Press.

Arendt, Hannah (1960), *The Origins of Totalitarianism*, New York: Harcourt Brace.

Armstrong, Barbara N (1932), *Insuring the Essentials*, New York: Macmillan.

Asher, Judith (2010), *The Right to Health. A Resource Manual for NGOs*, Leiden: Martinus Nijhoff Publishers.

Baldwin, Peter (1990), *The Politics of Social Solidarity. Class Bases of the European Welfare State 1875–1975*, Cambridge: Cambridge University Press.

Barak-Erez, Daphne and Aeyal M Gross. (eds) (2007), *Exploring Social Rights: Between Theory and Practice*, Oxford: Hart Publishing.

Becker, Ulrich, Frans Pennings and Tineke Dijkhoff (eds) (2013), *International Standard-Setting and Innovations in Social Security*, Alphen aan den Rijn: Kluwer Law International.

Berlin, Isaiah (1958), *Two Concepts of Liberty*, Oxford: Oxford University Press.

Berlin, Isaiah (1969), *Four Essays on Liberty*, Oxford: Oxford University Press.

Beyer, Gerald J (2012), 'Economic Rights: Past, Present and Future', in Thomas Cushman (ed.), *Handbook of Human Rights*, London/New York: Routledge, 291 ff.

Bilchitz, David (2008), *Poverty and Fundamental Rights: The Justification and Enforcement of Socio-Economic Rights*, Oxford: Oxford University Press.

Bosniak, Linda (2008), *The Citizen and the Alien. Dilemmas of Contemporary Membership*, Princeton and Oxford: Princeton University Press.

Cesaro, Jean-Francois (2011), *L'égalité en droit social*, Paris: LexisNexis.

Cholewinski, Ryszard, Paul de Guchteneire and Antoine Pécoud (eds) (2009), *Migration and Human Rights. The United Nations Convention on Migrant Workers' Rights*, Cambridge: Cambridge University Press.

Coomans, Fons (2006), 'Some Introductory Remarks on the Justiciability of Economic and Social Rights in a Comparative Context', in Fons Coomans (ed.), *Justiciability of Economic and Social Rights. Experiences from Domestic Systems*, Antwerp: Intersentia, 1 ff.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

Cousins, Mel (2009), 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' *JSSL*, **16**, 120.
De Burca, Grainne and Bruno de Witte (eds) (2005), *Social Rights in Europe*, Oxford: Oxford University Press.
De Schutter, Olivier (2010), *International Human Rights Law*, Cambridge: Cambridge University Press.
De Schutter, Olivier (2010), 'The Two lives of the European Social Charter', in Olivier De Schutter (ed.), *The European Social Charter: A Social Constitution for Europe*, Brussels: Bruylant, 11 ff.
Deakin, Simon (2005), 'The "Capability" Concept and the Evolution of European Social Policy', in Eleanor Spaventa and Michael Dougan (eds), *Social Welfare and EU Law*, Oxford/Portland: Hart Publishing, 3 ff.
Eichenhofer, Eberhard (2012), *Soziale Menschenrechte im Völker-, europäischen und deutschen Recht*, Tübingen: Mohr Siebeck.
Eichenhofer, Eberhard (2013), 'Constitutional Guarantees of Social Protection', in K. Ketscher et al (eds), *Velferd og rettferd, Festskrift til Asbjorn Kjonstad, 70 ar*, Oslo: Gyldendal Juridisk, 127.
Eichenhofer, Eberhard (2013), *Recht des aktivierenden Wohlfahrtsstaates*, Baden-Baden: Nomos.
Eide, Asbjorn (ed.) (2001), *Economic, Social and Cultural Rights*, Dordrecht: Martinus Nijhoff Publishers.
Epstein, Abraham (1933), *Insecurity: A Challenge to America*, New York: American Economic Association.
Esping-Andersen, Gøsta (1990), *The Three Worlds of Welfare Capitalism*, Cambridge: Cambridge University Press.
Fabre, Cecile (2000), *Social Rights under the Constitution. Government and the Decent Life*, Oxford: Oxford University Press.
Fredman, Sandra (2008), *Human Rights Transformed*, Oxford: Oxford University Press.
Georgis, Andrea (2008), 'Article 34', in William BT Mock and Gianmario Denaro (eds), *Human Rights in Europe: Commentary on the Charter of Fundamental Rights of the European Union*, Durham: Carolina Academic Press.
Giddens, Anthony (1994), *Beyond Left and Right*, Cambridge: Polity.
Glendon, Mary Ann (2001), *A World Made New*, New York: Random House.
Habermas, Jürgen (1998), *Faktizität und Geltung*, Frankfurt am Main: Springer.
Harris, David and John Darcy (2001), *The European Social Charter*, 2nd edition, Washington: Pail institute.
Harris, Neville (2000), 'The Welfare State, Social Security, and Social Citizenship Rights', in Neville Harris (ed), *Social Security Law in Context*, Oxford: Oxford University Press.
Hepple, Bob (2011), *Equality. The New Legal Framework*, Oxford and Portland: Hart Publishing.
ILO (2001), *Social Security: A New Consensus*, Geneva: ILO.
ILO (2008), *Setting Social Security Standards in a Global Society*, Geneva: ILO.
ILO (2011), *Social Security and the Rule of Law*, Geneva: ILO.
Kaufmann, Christine (2007), *Globalisation and Labour Rights. The Conflict between Core Labour Rights and International Economic Law*, Oxford and Portland: Hart Publishing.
King, Jeff (2013), *Judging Social Rights*, Cambridge: Cambridge University Press.
Kulke, Ursula, Michael Cichon and Karana Pal (2007), 'Changing Tides: A Revival of a Rights-Based Approach to Social Security', in Jef van Langendonck (ed.), *The Right to Social Security*, Antwerp: Intersentia 13 ff.
Langford, Malcolm (2008), *Social Rights Jurisprudence*, Cambridge: Cambridge University Press.
MacCormick, Neil (1982), 'Legal Right and Social Democracy', in Neil MacCormick, *Legal Right and Social Democracy, Essays in Legal and Political Philosophy*, Oxford: Oxford University Press 1 ff.
McKeever, Grainne (2009), 'Balancing Rights and Responsibilities: The Case of Social Security Fraud', *JSSL* **16**, 139 ff.
McLachlan, Hugh V (2005), *Social Justice, Human Rights and Public Policy*, Glasgow: Humming Earth**.**
Marshall, Thomas Humphrey (1992), 'Citizenship and Social Class', in Thomas Humphrey Marshall and Tom Bottomore (eds), *Citizenship and Social Class*, London: Pluto Press 3 ff.
Mikkola, Matti (2010), *Social Human Rights of Europe*, Helsinki: Legisactio.
Nußberger, Angelika (2006), 'Article 34', in Peter J Tettinger and Klaus Stern, *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, Munich: Beck.
Paine, Thomas (1791), *The Right of Man*, London, www.ushistory.org/paine/rights/index.htm.
Pennings, Frans (2007), 'The Meaning of International Standards in Social Security', in Jef van Langendonck (ed.), *The Right to Social Security*, Antwerp: Intersentia.
Pennings, Frans (2013), 'Historical and Theoretical Background of Standard Setting in Social Security', in Frans Pennings, Ulrich Becker and Tineke Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security*, Alphen aan den Rijn: Kluwer Law International 15.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

Plant, Raymond (1998), 'Citizenship, Rights, Welfare', in Jane Franklin (ed), *Social Policy and Social Justice*, Cambridge: Polity 57 ff.
Ramcharan, Bertrand G (2008), 'Norms and Machinery', in Thomas G Weiss and Sam Daws (eds), *The Oxford Handbook on the United Nations*, Oxford: Oxford University Press 443.
Rawls, John (1971), *A Theory of Justice*, Oxford: Oxford University Press.
Riedel, Eibe (2007), 'The Human Right to Social Security, Some Challenges', in Eibe Riedel (ed), *Social Security as a Human Right*, Berlin/Heidelberg: Springer 17 ff.
Rimlinger, Gaston (1971), *Welfare Policy and Industrialization in Europe, America and Russia*, Hoboken: John Wiley & Sons Inc.
Roman, Diane (2012), *La justicibialité des droits sociaux: Vecteurs et résistances*, Paris: Editions Pedone.
Roosevelt, Franklin D (1941), 'The Annual Message to the Congress, January 6th, 1941', in Samuel Rosenman, *The Public Papers and Addresses of Franklin D Roosevelt*, Vol. VI *(War – and Aid to Democracies)*, New York 663 ff.
Roosevelt, Franklin D (1950), 'Speech from January 11th, 1944. 'For unless there is security here at home there cannot be lasting peace in the world – Message to the Congress on the State of the Union', in Samuel Rosenman, *The Public Papers and Addresses of Franklin D Roosevelt*, Vol. VIII (*Victory and the Threshold of Peace*), New York 1950, 32.
Samuel, Lenia (1997), *Droits sociaux fondamentaux. Jurisprudence de la Charte sociale européenne*, Strasbourg: Editions du Conseil de l'Europe.
Sen, Amartya (1992), *Inequality Reexamined*, New York: Russell Sage Foundation.
Shiman, David A (1999), *Economic and Social Justice, A Human Rights Perspective*, Minneapolis: Human Rights Resource Center.
Ssenyonjo, Manisuli (2009), *Economic, Social and Cultural Rights in International Law*, Oxford: Hart Publishing.
Tapiola, Kari (2013), 'Global Standards: The Policy of the ILO', in Frans Pennings, Ulrich Becker and Tineke Dijkhoff (eds), *International Standard-Setting and Innovations in Social Security*, Alphen aan den Rijn: Kluwer Law International, 43.
Van Langendonck, Jef (2007), 'The Meaning of the Right to Social Security', in Jef van Langendonck (ed.), *The Right to Social Security*, Antwerp: Intersentia.
Van Langendonck, Jef (2009), 'Freedom and Social Security', in L Mitrus (ed), *Liber Amicorum Prof. Dr. habil. Andrzej Marian Swiatkowski, Studies in Labour Law and Social Policy*, Krakow: Rocznik.
Veit-Wilson, John (2007), 'Some Social Policy Implications of a Right to Social Security', in Jef van Langendonck (ed.), *The Right to Social Security*, Antwerp: Intersentia 57.
William, Lucy (2007), *Philosophy of Private Law*, Oxford: Clarendon Press.
Young, Iris Marion (1990), *Justice and the Politics of Difference*, Princeton: Princeton University Press.
Yuval, Shany (2007), 'Stuck in a Moment in Time: The International Justiciability of Economic, Social and Cultural Rights', in Daphne Barak-Erez and Aeyal M. Gross. (eds), *Exploring Social Rights: Between Theory and Practice*, Oxford: Hart Publishing.

Eberhard Eichenhofer - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:41:29AM
via free access

2. Growing apart together: Solidarity and citizenship in Europe

*Dimitry Kochenov**

I. GOAL AND STRUCTURE

The goal of this chapter is to question the popular intuitions related to automatic associations between contemporary citizenship and social security and solidarity. While TH Marshall quite famously connected the two,[1] the contemporary legal landscape in Europe and elsewhere in the world has changed significantly since he wrote that essay:[2] citizenship as a legal status of belonging to a polity[3] and 'social citizenship'[4] as a legal status of full entitlement to social solidarity in a particular polity have parted ways.

This is due to a number of factors, which include the general erosion of citizenship observable over the last 50 years: the citizenship rights basket is simply not as full now as it used to be.[5] The growing dynamics of inclusion and the recognition of the rights of non-citizen residents have also played a role: Arendt's absolutist view of the 'right to have rights'[6] is somewhat less acute today as increasingly many people live in countries the citizenship of which they do not hold.[7] Equally, the emergence of new

* My gratitude goes to Eberhard Eichenhofer for his detailed and most helpful comments on the first draft as well as to Eva Kappelhof and Harry Panagopulos for their helpful assistance with the preparation of this work for publication.

1 See generally TH Marshall, *Citizenship and Social Class and Other Essays* (CUP 1950).

2 TH Marshall's typology of citizenship rights could never fit the story of EU citizenship's development. For a detailed analysis, see, G de Búrca, 'Report on the Further Development of Citizenship in the European Union' (2001) *Zeitschrift für Schweizerisches Recht* 39, 50.

3 For an excellent overview of the literature on the key principles of drawing the boundaries of belonging, see MJ Gibney, 'The Rights of Non-citizens to Membership' in C Sawyer and BK Blitz (eds), *Statelessness in the European Union* (CUP 2011) 41.

4 S Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008).

5 C Joppke, 'Immigration and the Identity of Citizenship: The Paradox of Universalism' (2008) 12 *Citizenship Studies* 542; D Kostakopoulou, 'Citizenship Goes Public: The Institutional Design of Anational Citizenship' (2009) 17 *Journal of Political Philosophy* 275; C Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 9.

6 H Arendt, The Origins of Totalitarianism (first published in 1951, Harcourt Brace & Co 1979) 226. See also: Perez v Brownell (1958) 356 US 44, 64 (Warren, CJ, dissenting); also Trop v Dulles (1958) 356 US 86, 101–02 ('[T]he use of denationalization as a punishment is barred by the Eighth Amendment … In short, the expatriate has lost the right to have rights.').

7 D Kostakopoulou, 'Why Naturalisation?' (2003) 4 *Perspectives on European Politics & Sociology* 85; JH Carens, 'Citizenship and Civil Society: What Rights for Residents?' in R Hansen and P Weil (eds), Dual Nationality, Social Rights and Federal Citizenship in the U.S. and Europe (Randall Books 2002) 100, 109–113. See also Y Zilbershats, 'Reconsidering the Concept

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

legal-political arenas responsible for social justice and boasting redistributive functions – from the sub-national to the supra-national levels – should be considered.[8] From your parish and your region[9] to the EU as such,[10] we are constantly reminded that the state is not the only – and at times not the most important – provider for the needy.[11] Michael Dougan and Eleanor Spaventa are absolutely right in their assessment that 'the idea of social solidarity can no longer be treated as a national or local monopoly'.[12] The specific EU legal context of constant redistribution[13] and the rising importance of EU citizenship[14] add another significant element of complexity to the general picture of the interaction between citizenship and social solidarity.[15]

---

of Citizenship' (2001) 36 *Texas International Law Journal* 689. For an analysis of such non-national residents' entitlements in the European context see, eg, AP van der Mei, Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits (Hart Publishing 2003); A Somek, 'Concordantia Catholica: Exploring the Context of European Antidiscrimination Law and Policy', (2004–2005) 14 *Transnational Law and Contemporary Problems* 959; JC Barbier, La longue marche vers l'Europe sociale (PUF 2008); F de Witte, 'EU Law, Politics, and the Social Question' (2013) 14 *German Law Journal* 581. Also, in general, N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013).

[8] J Gerhards, 'Free to Move? The Acceptance of Free Movement of Labour and Non Discrimination among Citizens of Europe' (2008) 10 *European Societies* 121.

[9] Case C-212/96 *Government of the French Community and Walloon Government v Flemish Government* [2008] ECR I-1683. For a helpful analysis, see P Van Elsuwege and S Adam, 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur l'Assurances soins flamande' [2008] *Cahiers de droit européen* 655.

[10] F Nicola, 'Conceptions of Justice from Below: Distributive Justice as a Means to Address Local Conflicts in European Law and Policy', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015); F Strumia, 'Remedying the Inequalities of Economic Citizenship in Europe: Cohesion Policy and the Negative Right to Move' (2011) 17 *European Law Journal* 725; D Chalmers, 'The European Redistributive State and a European Law of Struggle' (2012) 18 *European Law Journal* 667; C O'Cinneide, 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and "Social Europe"', in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013) 118.

[11] For an enlightening analysis, see J Clarke, 'Welfare States as Nation States: Some Conceptual Reflections' (2005) 4 *Social Policy and Society* 407.

[12] M Dougan and E Spaventa, '"Wish You Weren't Here …" New Models of Social Solidarity in the European Union', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 181.

[13] A Williams, 'The Problem(s) of Justice in the European Union', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[14] For a literature overview, see, D Kochenov, 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' (2013) 62 *International and Comparative Law Quarterly* 97. See also D Kochenov and R Plender, 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' (2012) 37 *European Law Review* 369.

[15] For an overview, see, eg, N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis* (CUP 2013).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

EU citizenship,[16] combined with market-related factors recognised in the supranational legal reality as triggers of a legitimate connection with EU law,[17] brings about entitlements and protections which empower individuals in the face of the classical territory-based social security systems of the Member States,[18] which emerge as profoundly suspect categories,[19] prone to generating injustices.[20] The connection between solidarity and the conceptual foundations of EU citizenship has been outlined by Catherine Barnard,[21] who argued, that '[t]he principle of "solidarity" is taking root as a guiding principle of European Community law'.[22] Contemporary development in the areas of citizenship, social rights and the building of the Union in Europe thus brought about a dramatic change in the legal landscape since the reality in which TH Marshall's essay was conceived. This chapter will focus on a few of the key aspects of this reality of a renewed interaction between citizenship and social solidarity.

---

[16] Art 9 Consolidated Version of the Treaty on European Union [2008] OJ C 115/13, Part II Consolidated version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01. For recent analyses, see, eg, D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2016 (forthcoming)); F Strumia, *Supranational Citizenship and the Challenge of Diversity-Immigrants: Citizens and Member States in the EU* (Martinus Nijhoff 2013); M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012).

[17] N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *Common Market Law Review* 1597; C O'Brien, 'I Trade, Therefore I Am: Legal Personhood in the European Union' (2013) 50 *Common Market Law Review* 1643. For criticism, see D Kochenov, 'The Citizenship Paradigm' (2013) 15 *Cambridge Yearbook of European Legal Studies* 196.

[18] O Gerstenberg, 'The Question of Standards for the EU: From "Democratic Deficit" to "Justice Deficit"?', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[19] 'After more than half a century of coordination, the last remnants of territoriality are now vanishing': N Rennuy, 'Assimilation, Territoriality and Reverse Discrimination: A Shift in European Social Security Law?' (2011) *European Journal of Social Law*, 289, 319. See also DS Martinsen, 'Social Security Regulation in the EU: The De-Territorialisation of Welfare?', in G. de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity* (OUP 2005) 89; M Dougan, 'The Spacial Restructuring of National Welfare States within the European Union', in U Neergaard, R Nielsen and LM Roseberry (eds), *Integrating Welfare Function into EU Law: From Rome to Lisbon* (Djøf Publishing 2009).

[20] J Shklar, *The Faces of Injustice* (Yale University Press 1992). In the EU context, see D Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015); D Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal*.

[21] C Barnard, 'EU Citizenship and the Principle of Solidarity' in M Dougan and E Spaventa (eds), *Social Welfare and European Union Law* (Hart Publishing 2005) 157; L Azoulai, 'La citoyenneté européenne, un statut d'intégration sociale', in *Mélanges Jean Paul Jacqué. Chemins d'Europe* (Dalloz 2010); C Barnard, 'Social Policy Revisited in the Light of the Constitutional Debate', in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debat*e (OUP 2007) 109, 121.

[22] C Barnard, 'EU Citizenship and the Principle of Solidarity' in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 157; R O'Gorman, 'The Proportionality Principle and Union Citizenship' (2009) *Mitchell Working Paper* 1/2009, 4–11; M Wind, 'Post-National Citizenship in Europe: The EU as a "Welfare Rights Generator?"' (2009) 15 *Columbia Journal European Law* 239.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

To provide a glimpse of the contemporary state of play in citizenship's interaction with social solidarity in Europe, this chapter – following a brief introduction to citizenship's arbitrary and exclusionary nature and the general dynamics in the development of the notion over the last decades (II) – will explore three problematic assumptions behind the popular approaches to the interaction between citizenship and social solidarity.[23] Citizenship is not necessarily directly connected to social solidarity and social rights (III). The state is not a necessary arena of social solidarity; social rights do not require an elusive *demos* or national unity as a necessary precondition (IV). While the EU's contribution to the complex picture of the framing of social solidarity in Europe is touched upon throughout, the chapter concludes by analysing the interactions between social solidarity and citizenship in the Union in the context of the misconceptions outlined.

II. CITIZENSHIP DYNAMICS

Citizenship, which is a legal status of belonging associated with a bundle of rights,[24] is traditionally connected to notions of the state. EU citizenship, which follows derivative *ius tractum* logic, drawing on the nationalities of the Member States of the European Union, is a highly atypical creature.[25] In a sense, it exemplifies the times of change which traditional citizenship, as commonly understood, is going through:[26] 100 or even 50 years ago, EU citizenship would simply have been inconceivable.[27] In addition to being a derivative concept, it is also autonomous,[28] which has far-reaching implications for the functioning of the Member State nationalities[29] – precisely the legal statuses

[23] For a wonderful analysis, see, equally, J Clarke, 'Welfare States as Nation States: Some Conceptual Reflections' (2005) 4 *Social Policy and Society* 407.

[24] R Bauböck and V Guiraudon, 'Introduction: Realignments of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance' (2009) 13 *Citizenship Studies* 439.

[25] D Kochenov, '*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights' (2009) 15 *Columbia Journal of European Law* 169. On the federal parallels in connection to this status, see C Schönberger, 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' (2007) 19 *Revue européenne de droit public* 61.

[26] For insightful overviews, see P Spiro, *Beyond Citizenship: American Identity after Globalisation* (OUP 2008); D Kostakopoulou, *The Future Governance of Citizenship* (CUP 2008); C Joppke, 'Immigration and the Identity of Citizenship: The Paradox of Universalism' (2008) 12 *Citizenship Studies* 533; C Joppke, 'Citizenship between De- and Re-Ethnicization (I)' (2003) 44 *Archive européen de sociologie* 436; L Bosniak, 'Constitutional Citizenship Through the Prism of Alienage' (2002) 63 *Ohio State Law Journal* 1285, 1285.

[27] For a historical evolutionary account, see A Wiener, '*European' Citizenship Practice – Building Institutions of a Non-State* (Westview Press 1998).

[28] Opinion of AG Poiares Maduro in Case C-135/08, *Janko Rottmann v Freistaat Bayern* [2010] ECR I-1449, para 23: 'Union citizenship assumes nationality of a Member State but it is also a legal and political concept independent of that of nationality'.

[29] D Kochenov, 'Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship' (2010) EUI RSCAS Working Paper No 23/2010, 20.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

from which EU citizenship is derived – from the point of the conferral of the status of nationality[30] to the rights it brings.[31] Along with the functional Internal Market,[32] EU citizenship profoundly undermines a classical Westphalian view of the state. This situation has only become possible, however, because of the dissonance between 'classical' Westphalian conceptions and the contemporary constitutional realities.[33] In other words, the EU with its citizenship is as much the consequence of the already ongoing transformation as it is its cause in the concrete European context. The changing reality requires reassessing the key elements of our understanding of citizenship as well as the rights – and, ultimately, duties[34] – associated with it. This is where social entitlements come into play: their connections with citizenship, national unity and territoriality are profoundly questioned both in the EU and in the wider world.

Our world is a reflection of ideas[35] and the idea of the state is, potentially, one of the most repugnant of them all,[36] despite it being so much a part of our reality that, as you would expect, it is constantly taken for granted. At the origin of states and nations lies 'creating or elaborating an "ideological" myth of origins and descent'.[37] In *Mythologies* Roland Barthes explains that myths are not important for the story they tell, but for what they *do*.[38] The identity side of citizenship works in exactly the same way. Although the myth itself is always absurd, 'nationality is to a greater or lesser degree a manufactured item'[39] – '*l'oublie et l'erreur historique*'[40] – identity's perceived true nature is not thereby undermined, ensuring that people are ready to sacrifice it all, *mourir pour la Patrie*.[41] While states and nations significantly contribute to human social organisation, the ideological stances about their eventual 'inherent good' should

---

[30] Case C-135/08 *Janko Rottmann v Freistaat Bayer* [2010] ECR I-1449, para 42; D Kochenov, 'Annotation of Case C-135/08 *Rottmann*' (2010) 47 *Common Market Law Review* 1831; J Shaw (ed), 'Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law?' (2011) *EUI RSCAS Working Paper* No 62/2011.

[31] For a detailed analysis see D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2016 (forthcoming)). See also, for the general context, D Kochenov, 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' (2013) 19 *European Law Journal* 502.

[32] D Kochenov, 'Member State Nationalities and the Internal Market: Illusions and Reality' in N Nic Shuibhne and LW Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher* (OUP 2012) 245.

[33] See the literature in fn 26 *supra*.

[34] D Kochenov, 'EU Citizenship without Duties' (2014) 20 *European Law Journal* 482.

[35] PL Berger and T Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (Ancor 1967).

[36] P Allott, *Eunomia* (OUP 1990); I. Scobbie, 'Slouching towards the Holy City: Some Weeds for Philip Allott' (2005) 16 *European Journal of International Law* 299.

[37] AD Smith, *The Ethnic Origin of Nations* (Blackwell 1986) 147.

[38] 'In a mythical system causality is artificial, false; but it creeps, so to speak through the back door of Nature', R Barthes, *Mythologies* (translated by A Lavers) (Starus & Giroux 1972) 131.

[39] D Miller, 'The Ethical Significance of Nationality' (1988) 98 *Ethics* 657, 654.

[40] E Renan, *Qu'est-ce qu'une nation? et autres essais politiques* (Agora 1992) 41.

[41] See on the patriotic sacrifice eg, M Walzer, 'Civility and Civic Virtue in Contemporary America' (1974) 41 *Sociological Research* 4.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

be dismissed outright: a state or a nation cannot legitimately be approached as possessing any sacred value. This triggers numerous important questions, especially in those contexts when the willingness to die for the state abounds. 'If national allegiances can be based on false beliefs, how is it possible for a purportedly rational institution such as morality to accommodate them?'[42]

The same applies to citizenship. Unquestionably a truth created by law,[43] being a citizen depends, to a lawyer at least,[44] on one and only one thing: the possession of the status of citizenship in accordance with the law of a particular jurisdiction, to which certain rights can be attached. Just like 'nationality' or 'state', 'citizenship' is a notion with no ethical content, notwithstanding constant ideological spectacle surrounding it.[45] The core element of citizenship is exclusion[46] and the grounds for inclusion are as variable as they are random.[47] There is no objective truth in who should belong and who should not – any principle accepted in a particular society can necessarily be criticised or overturned. Malta is criticised for investment citizenship,[48] Spain is criticised for pardoning illegal migrants,[49] Ireland was criticised for *ius soli*,[50] Hungary was criticised for *ius sanguinis*.[51]

Citizenship is thus a profoundly problematic concept. These problems, once realised and set against the background of the growing importance of tolerance and human rights and world migration, increasing the exposure of people and groups with radically diverging world views to each other, resulting in the remarkable erosion of citizenship's substantive content which can be observed over the last decade. While the states came

---

[42] D Miller, 'The Ethical Significance of Nationality' (1988) 98 *Ethics* 657, 648; C Chwaszcza, 'The Unity of People, and Immigration in Liberal Theory' (2009) 13 *Citizenship Studies* 451.

[43] JM Balkin, 'The Proliferation of Legal Truth' (2003) 26 *Harvard Journal of Law and Public Policy* 5.

[44] For other disciplines, see, *inter alia*, E Isin, 'Citizenship in Flux: The Figure of the Activist Citizen' (2009) 29 *Subjectivity* 367; E Isin and G Nielsen (eds), *Acts of Citizenship* (ZED books 2008).

[45] G Debord, *La société de spectacle* (Gallimard 1996).

[46] R Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship' (2009) 51 *Archives européennes de sociologie* 1; R Bauböck, 'Global Justice, Freedom of Movement and Democratic Citizenship' (2009) 51 *Archives européennes de sociologie* 1; JH Carens, 'Aliens and Citizens: The Case for Open Borders' (1987) 49 *Review of Politics* 250, 251. For a literal legal-historical example of a legal status of citizenship designed to 'fail' certain groups see, eg, I Tyler, 'Designed to Fail: A Biopolitics of British Citizenship' (2010) 14 *Citizenship Studies* 61.

[47] MJ Gibney, 'The Rights of Non-citizens to Membership' in C Sawyer and BK Blitz (eds), *Statelessness in the European Union* (CUP 2011) 41.

[48] A Shachar, 'Dangerous Liasions: Money and Citizenship', in A Shachar and R Bauböck (eds), 'Should Citizenship be for Sale?' (2014) 1 *EUI RSCAS Working Paper* 3. For a reply, see, D Kochenov, 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price', in A Shachar and R Bauböck (eds), 'Should Citizenship Be for Sale?' (2014) 1 *EUI RSCAS Working Paper* 27.

[49] K Rostek and G Davies, 'The Impact of Union Citizenship on National Citizenship Policies' (2010) 10(5) *European Integration Online Papers*, 1.

[50] Ibid.

[51] JM Arraiza, 'Good Neighbourliness as a Limit to Extraterritorial Citizenship: The Case of Hungary and Slovakia', in D Kochenov and E Basheska (eds), *Good Neighbourly Relations in the European Legal Context* (Brill Nijhoff 2015).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

to be more perceptive and tolerant of the actual differences between their citizens as human beings,[52] the obligations of citizenship started fading away,[53] just as the right to be left alone received prominence: citizenship is now a sparer notion than it has ever been: the state cannot tell you whom to be, it respects who you are.[54] Notwithstanding the fact that such a presentation is necessarily exaggerated, it is unquestionable that liberal democracies are having a hard time justifying their own non-existent 'uniqueness', which, in the hey-day of the nation state was simply presumed and formed the patriotic core of citizenship. It is now clear to the Dutch that they are in no way better – by virtue of being Dutch – than the British or the French are.[55] Although the Poles and the Greeks would beg to differ,[56] they do not undermine the general trend: citizenship is now legalistic and it cannot be otherwise.[57]

III. SOCIAL CITIZENSHIP

In this richly contested context, where randomness comes to the fore and the notion of citizenship is eroding as a result of the growing realisation that the world should not, actually, be divided into container societies and that the values behind particular grounds of inclusion and exclusion are randomly assigned and necessarily contestable – especially if we view the citizen as a person[58] – a prohibited view citizenship was designed to escape.[59] As Christian Joppke has marvellously demonstrated, a seemingly natural consequence of this is that the connection between citizenship and social rights is necessarily problematised in this context: the inclusion of other residents is a must. Japan is probably the only developed nation where old age subsistence benefits are

---

[52] L Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9. In the context of the EU, see, L Azoulai, 'L'autonomie de l'individu européen et la question du statut' (2013) 13 *EUI LAW Working Paper*.

[53] D Kochenov, 'EU Citizenship without Duties' (2014) 20 *European Law Journal* 482.

[54] C Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 9.

[55] This is a general trend. See, eg, J Tilley and A Heath, 'The Decline of British National Pride' (2007) 58 *British Journal of Sociology* 661.

[56] See, for an illuminating analysis of Eurostat data, J Gerhards, 'Free to Move? The Acceptance of Free Movement of Labour and Non-Discrimination among Citizens of Europe' (2008) 10 *European Societies* 121.

[57] C Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 9. In this context it is particularly instructive to observe the struggle of the liberal democracies to come up with naturalization tests – currently in fashion – which distinguish them from their neighbours, R van Oers, E Ersbøll and D Kostakopoulou (eds), *A Re-definition of Belonging?* (Koninklijke Brill 2010) 307; C Joppke, 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe' (2007) 30 *West European Politics* 1; D Kochenov, '*Mevrouw de Jong Gaat Eten*: EU Citizenship and the Culture of Prejudice' (2011) 6 *EUI RSCAS Working Paper*.

[58] L Bosniak, 'Persons and Citizens in Constitutional Thought' (2010) 8 *International Journal of Constitutional Law* 9.

[59] D Kochenov, 'Citizenship without Respect: The EU's Troubled Equality Ideal' (2010) 8 *Jean Monnet Working Paper* (NYU Law School) 15–22.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

citizenship-dependant at the moment.[60] Social solidarity does not mean citizenship and is based increasingly on residence, 'the new nationality'.[61] TH Marshall is passé. The disconnect between citizenship, presumed territorial or national solidarity and the like comes to the fore with even greater clarity once the concept of residence as such is dissected: often it amounts to little more than appearing before a municipal officer for 15 minutes once every five years (if at all) to renew a document.[62]

To reflect this reality, where the meaning of citizenship is increasingly decoupled from social solidarity, scholars need to update reality if we follow Balkin.[63] This is achieved by elaborating a notion of 'social citizenship', the citizenship of those entitled to the benefits of the safety nets of social security and assistance – an indispensable move in a situation where solidarity and 'real' citizenship, a legal status, have parted ways. Crucial in this respect is that 'social citizenship', in strictly legal terms, is not citizenship at all, since it also potentially includes those who are not in the possession of citizenship status in the jurisdiction where such 'social citizenship' is claimed. In other words, one needs to be overwhelmingly careful when dealing with the potentially misleading duo.[64]

Sandrine Maillard has outlined a clear and all-encompassing approach to social citizenship in Europe in a recent book.[65] Social citizenship, as she views it, was not only connected to workers' rights before the incorporation of EU citizenship into the *acquis*, but also, simultaneously, detached from *both* Member State nationalities and EU citizenship *sensu stricto*.[66] Given the general dynamics of the co-evolution of social rights and citizenship sketched above, this approach was bound to work well. The majority of social rights on closer inspection are not in fact granted exclusively on the basis of either Member State nationality or EU citizenship. In one example, long-term resident third-country nationals usually enjoy social rights too,[67] notwithstanding the fact that problems with the application of Article 18 TFEU to them abound, as they do not benefit from the general prohibition against discrimination on the basis of

---

[60] Japan Times, 'Foreign Residents Can't Claim Welfare Benefits: Supreme Court', available at <www.japantimes.co.jp/news/2014/07/18/national/social-issues/top-court-rules-non-japanese-residents-ineligible-welfare-benefits/#.VHi9HWdCw3Q>.

[61] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 *European Law Journal* 43.

[62] On the qualifying period of residence as a profoundly 'arbitrary concept', see Opinion of AG Sharpston, Joined Cases C-456/12 and C-457/12 *Minister voor Immigratie, Integratie en Asiel v O and Minister voor Immigratie, Integratie en Asiel v S* ECLI:EU:C:2013:837, para 102.

[63] JM Balkin, 'The Proliferation of Legal Truth' (2003) 26 *Harvard Journal of Law and Public Policy* 5.

[64] For the different theoretical constructions of citizenship which do not overlap with the traditional legal status, see eg G Mundlak, 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' (2007) 8 *Theoretical Inquiries in Law* 719.

[65] S Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008) 65–80.

[66] Ibid, 257 ff.

[67] For a detailed analysis, see eg A Wiesbrock, *Legal Migration to the European Union* (Martinus Nijhoff 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

nationality in the context of EU law.[68] The reverse is equally true and is likely to be revealed increasingly often, particularly in the EU legal context: the number of entitlements open to non-resident citizens will diminish.[69] A strong dissociation emerges between citizenship and social citizenship.

The consequences of such dissociations are twofold. Firstly, it does not matter whether a social citizen is in possession of the legal status of nationality of the Member State of residence or EU citizenship. Secondly, nationality of a Member State or EU citizenship would not necessarily guarantee preferential treatment when decoupled from residence.[70] In this context, the relevance of Member State nationality or EU citizenship in the social plane is only determined by the extent to which the two can affect the access to residence – a formal legal status not to be confused with presence – durable enough to endow individuals with social rights: 'residence is new nationality'.[71] In the EU residence entitling to full equality is connected either to the status of permanent residence[72] or a status of 'worker'[73] – either directly[74] or by derivation.[75]

---

[68] While S Maillard, among numerous other scholars, seems to presume the non-application of the provision to third-country nationals (S Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008) 333–335), more progressive accounts are also available: P Boeles, 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?' (2005) 12 *Sociaal-economische wetgeving* 502; A Epiney, 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship' (2007) 13 *European Law Journal* 611; C Hublet, 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' (2009) 15 *European Law Journal* 757.

[69] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 *European Law Journal* 43. But see Case C-192/05 *K Tas-Hagen en RA Tas v Raadskamer WUBO van de Pensioen- en Uitkeringsraad* [2006] ECR I-10451. Stretching the over-pervasiveness of the concept of residence is not always helpful.

[70] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 *European Law Journal* 43.

[71] Ibid.; S Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008) 65–80, 410.

[72] D Acosta Arcarazo, *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship* (Brill 2011).

[73] Or other relevant economically active statuses – job-seeker, self-employed or service provider. In Strumia's words: '[E]conomic citizenship belongs to any economic actor in the EU who, notwithstanding nationality, has a qualifying link to the internal market': F. Strumia, 'Remedying the Inequalities of Economic Citizenship in Europe: Cohesion Policy and the Negative Right to Move' (2011) 17 *European Law Journal* 728.

[74] Workers' social rights, job seekers etc. case-law. Case C-292/89 *The Queen and Immigration Appeal Tribunal v G D Antonissen* [1991] ECR I-745; Joined cases C-22/08 and C-23/08 *Athanasios Vatsouras and Josif Koupatantze v Arbeitsgemeinschaft Nürnberg* [2009] ECR I-4585. For an analysis, see, PE Minderhoud, 'Free Movement, Directive 2004/38 and Access to Social Benefits', in PE Minderhoud and C Trimikliniotis (eds), *Rethinking the Free Movement of Workers. The European Challenges Ahead* (Wolf 2009) 69.

[75] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and the Secretary of State for the Home Department* [2010] ECR I-1065; Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107. For an analysis, see, C O'Brien, 'Case C-310/08 *Ibrahim* Case C-480/08 *Teixiera*' (2011) 48(1) *Common Market Law Review* 203–225.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

The contours of all these categories are flexible and contestable.[76] It is thus essential to realise, following AG Mazák, that 'the distinction [between economically active and non-active persons] is neither absolute, nor indefinite'.[77] This obviously affects all the derivative rights too.[78]

In the context of the cross-pollination of EU citizenship and economic freedoms in the Treaties outlined, *inter alia*, by Síofra O'Leary,[79] a danger exists that EU 'workers'' access to social citizenship could also be constrained by using the tools developed in the context of non-economically active EU citizens,[80] intended to delay the full application of Article 18 TFEU in the *Geist* of the secondary legislation and case-law which seeks to prevent so-called 'benefits tourism'.[81] Notwithstanding the Court's occasional willingness to help,[82] its general approach to the issue[83] is much criticised in the literature.[84]

All in all, while scholars too numerous to mention aim to 'shield' national-level solidarity from EU interference, a contrasting approach, exemplified by Gareth Davies' enlightening scholarship, points to the benefits of exposing state-run monopolistic social solidarity systems to competition with a view to increasing efficiency and improving lives.[85] After all, a claim that the 'shielded' national solidarity systems are

---

[76] C O'Brien, 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' (2008) 33 *European Law Review* 643; C O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *Common Market Law Review* 1107.

[77] Opinion of AG Mazák in Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and the Secretary of State for the Home Department* [2010] ECR I-1065, para 42.

[78] Case C-310/08 *London Borough of Harrow v Nimco Hassan Ibrahim and the Secretary of State for the Home Department* [2010] ECR I-1065; Case C-480/08 *Teixeira v London Borough of Lambeth and Secretary of State for the Home Department* [2010] ECR I-1107.

[79] S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe?' [2008] No 6/2008 *Mitchell Working Paper* (Edinburgh) 15–24.

[80] This is particularly acute in cross-border work, C O'Brien, 'A Stage, a Spotlight and an Unwritten Script: Frontier Zones and Intersectional Citizens', in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) 73.

[81] See eg, C-333/13 *Elisabeta Dano and Florin Dano v Jobcenter Leipzig* [2014] ECLI:EU:C:2014:2358.

[82] Case C-209/03 *Bidar* [2005] ECR I-2119; O Golynker, 'Student Loans: The European Concept of Social Justice According to Bidar' (2006) 31 *European Law Review* 390.

[83] For an overview, see, F Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States' (2012) 28 *International Journal of Comparative Labour Law and Industrial Relations* 307.

[84] AP van der Mei, 'Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid' (2009) 16 *Maastricht Journal of European and Comparative Law* 477; M Mataija, 'Case C-158/07, *Jacqueline Förster v. IB-Groep* – Student Aid and Discrimination of Non-Nationals: Clarifying or Emaciating Bidar?' (2009) 15 *Columbia Journal European Law Online* 59.

[85] G Davies, 'Services, Citizenship, and the Country of Origin Principle' (2007) *Mitchell Working Paper* No 2/2007, 21; AP van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State' (2005) 7 *European Journal on Migration and Law* 203, 210.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

per se better than any possible alternative is absurd and cannot be taken seriously.[86] However, since Member State nationalities can be cherished by their holders because of the trust they put in the social services provided by their states, being vocal about the actual detachment of citizenship and 'social citizenship', as well as allowing for open competition between what states *actually* provide, can result in the 'hollowing of national citizenship'.[87] Consequently, the crusades to defend national solidarity against EU encroachments seem to boil down to an ideological stance, not grounded in reality. Try to explain to a Scottish lady dying of cancer that her life has to be sacrificed in the name of social solidarity, as the UK taxpayers' money may not be spent in Holland, where she would be cured, and embracing the mainstream approach becomes much more difficult.[88]

Consequently, social citizenship – a *non-citizenship* in legal terms – emerges as a parallel layer of citizenship in Europe, which is largely residence based, requiring the situation of the whole debate on the European social model within a much larger context – which Maillard masterfully does in her study, demonstrating the fading in importance of nationality *as such* in the context of modern social law, part of the general package of Joppkean 'inevitable lightening of citizenship'.[89] The link between a Member State nationality or EU citizenship and social solidarity appears not at all necessary[90] in the context of the emergence, following Sandrine Maillard, of 'solidarité au-delà de la nationalité'.[91] In this context the potential influence of EU citizenship on social solidarity emerges as a greatly inflated topic. While social solidarity is obviously and directly affected by EU citizenship (see *infra*), this process has little to do as such with the dynamics of EU integration and is a direct reflection of broader global trends – globalisation and the rise of human rights.

---

[86] Moreover, crucially, such 'protection' of the social security systems always works only one way, exclusively benefiting the richer states in the Union and their residents, while ensuring a strict separation between the richer and poorer parts, as D Kukovec has brilliantly demonstrated in the only serious legal paper on the issue to date: D Kukovec, 'Whose Social Europe?' (2011) 3 *Institute for Global Law and Policy Paper* (Harvard Law School).

[87] G Davies, 'Services, Citizenship, and the Country of Origin Principle' (2007) 2 *Mitchell Working Paper* (Edinburgh) 21.

[88] R Lavaggi and M Montefiorio (eds), *Health Care Provision and Patient Mobility* (Springer 2014).

[89] C Joppke, 'The Inevitable Lightening of Citizenship' (2010) 51 *European Journal of Sociology* 9.

[90] An interesting situation, especially concerning posted workers, arose in the field of free movement of services and also in free movement of companies. See eg U Belavusau, 'The Case of *Laval* in the Context of the Post-Enlargement EC Law Development' (2008) 9 *German Law Journal* 2279 (and the literature cited therein). The issue has virtually hijacked scholarly attention for a while.

[91] S Maillard, *L'émergence de la citoyenneté sociale européenne* (Presses Universitaires d'Aix-Marseille 2008) 65–80, 410. She goes on: 'la consécration de la solidarité au rang des valeurs de l'Union est de nature à fonder la reconnaissance des droits sociaux attachés à la citoyenneté sociale au profit de tout résident entrant et séjournant régulièrement sur le territoire communautaire, *indépendamment de sa nationalité* et de toute condition dite d'intégration', ibid, 443 (emphasis added).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

IV. SOLIDARITY, UNITY AND THE STATE

Alongside the thinning link between social solidarity and citizenship – the cause of the formulation of the 'social citizenship' concept – the link between social solidarity and the state is also legitimately questioned. Crucially, it is abundantly clear at this stage that a nation state is *not* a necessary platform for a system of social solidarity, which numerous sub-national social security systems demonstrate.[92] This naturally diminishes even further the theoretical relevance of citizenship as a legal status of belonging to a state or other legal-political constellations[93] in the context of the discussion of the design and functioning of social solidarity systems.

Once it is established that social solidarity and the state are not a necessary pair, all the ideologically charged presentations of citizenship as a reflection of strong bonds among the members of a mature *demos* eager to help each other precisely because these bonds are so dear to them can be dismissed outright, as they demonstrate no connection with reality. It is not always useful – and can also cause harm – to be a romantic. Analysis of the practical functioning of social assistance systems, such as the one meticulously conducted by Michael Keating, thus enables complete disagreement with the still popular view espoused *inter alia* by Richard Bellamy, that 'welfare rights tend to be best protected in unitary, parliamentary systems where a strong and cohesive *demos* provides the social solidarity needed to allow legislative majority's [*sic*] to pass redistributive measures'.[94] Indeed, as Clarke has overwhelmingly demonstrated, 'the apocalyptic claim that globalisation meant the "End of the Welfare State" has largely been discredited as evidence of the persistence of survival of (national) welfare states has mounted',[95] hence the need to rethink the truths behind popular assumptions.

When such positions are dismissed as unsound, besides its far-reaching implications for the understanding of the essence of social rights, the design of European citizenship can be presented in a relatively new light. To cut a long story short, *demos* and 'being a state' – the key post-war presumptions underlying social policy[96] – do not constitute necessary features in the context of distributive justice, as Andrew Williams *inter alia* has forcefully argued.[97] In other words, the EU's 'no-*demos* problem' in the context of social solidarity is not a problem at all, on closer inspection, and the 'transfer of

---

[92] M Keating, 'Social Citizenship, Solidarity and Welfare in Regionalised and Plurinational States' (2009) 13 *Citizenship Studies* 501, 506–510.

[93] There are also regional citizenships, of course, in addition to state citizenship and EU citizenship: D Kochenov, 'Regional Citizenships in the EU' (2010) 35 *European Law Review* 307.

[94] R Bellamy, 'The European Constitution Is Dead, Long Live European Constitutionalism' (2006) 13 *Constellations* 181, 185.

[95] J Clarke, 'Welfare States as Nation States: Some Conceptual Reflections' (2005) 4 *Social Policy and Society* 407.

[96] Ibid.

[97] A Williams, 'The EU, Interim Global Justice and the International Legal Order', in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order* (CUP 2013) 62.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

allegiance to the EU'[98] is absolutely not necessary for it to function properly, its redistributive facet included. In this sense, the accounts of EU-level citizenship and its implications provided by Joseph Weiler[99] and Gianluigi Palombella[100] see the lack of this aspect precisely as a strong point.[101] After all, there is no reason to believe that Habermasean 'constitutional patriotism' is anything other than 'the last refuge of a scoundrel'.[102]

V. SOCIAL SOLIDARITY AND THE EUROPEAN UNION

The EU thus operates as an actor of redistribution in a context which is highly ideological and unreasonably hostile, as the above analysis demonstrated: in addition to the need for a *demos* assumption, social lawyers on a crusade to 'protect' their national systems also appeal to the connections between social citizenship and identity, social assistance and the state, and citizenship and social assistance. As demonstrated above, the need for all these connections is controversial to say the least. This especially concerns the presumption of 'social dumping' in the EU. While it is generally assumed that EU citizenship can lead to the greatly feared erosion of solidarity or a 'race to the bottom' between the providers of social services at the national and local level,[103] empirical evidence to support this is entirely absent,[104] as Michael Keating, among

---

[98] R Bellamy, 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' (2008) 12 *Citizenship Studies* 598, 609.

[99] JHH Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*', in JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 7.

[100] G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 *International Journal of Constitutional Law* 357.

[101] See also D Kostakopoulou, 'Political Alchemies, Identity Games and the Sovereign Debt Instability: European Identity in Crisis or the Crisis in Identity-Talk?' (2012) 63 *Review of International Affairs* 97; D Kochenov, 'Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice' (2011) 6 *EUI Working Paper RSCAS*.

[102] JHH Weiler, 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*', in JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State* (CUP 2003) 18.

[103] In one example, M Dougan sounded several warnings in this regard in the wake of the EU's enlargement: 'Enlargement might lead to large-scale benefit migration towards western countries which have established generous welfare systems; that a massive influx of workers from the CEEC would seriously disrupt labour markets in the EU-15; that difference between wages and other compliances costs might lead to social dumping in favor of undertakings from the CEEC': M Dougan, 'A Spectre Is Haunting Europe … Free Movement of Persons and Eastern Enlargement', in C Hillion (ed), *EU Enlargement: A Legal Approach* (Hart Publishing 2004) 111, 112. None of these have materialised. For a well-argued point from a pro-unity perspective, see U Belavusau, 'The Case of *Laval* in the Context of the Post-Enlargement EC Law Development' (2008) 9 *German Law Journal* 2279.

[104] K Groenendijk, 'Access for Migrants to Social Assistance: Closing the Frontiers or Reducing Citizenship?', in E Guild, S Carrera and K Eisele (eds), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU* (Centre for European Policy Studies 2013) 1.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

others, compellingly demonstrates.[105] Thus the whole debate around the dangers of EU citizenship for the social sphere tends to ignore the facts, which are quite simple: '[c]ontrary to the "race to the bottom" hypothesis, European governments have not dismantled their welfare systems in the face of market competition and, indeed, have retained a variety of distinct models'.[106] The ECJ has been quite successful in balancing irrational fears and legitimate concerns in this over-politicised field, where rationality is not always the technique employed by those involved.[107]

A crusade of numerous academics to 'defend' what they present as the social core of the Member States against the devastating effects of the Internal Market[108] is little more – as Damjan Kukovec has explained with remarkable clarity[109] – than an attempt to preserve the current *status quo* of profoundly unjust divisions between the centre and the periphery in the EU,[110] ensuring that the EU does not function as an equaliser of quality of life throughout its territory,[111] as well as – and this is just as harmful – an attempt to shield the Member States' established social security systems from indispensable Socratic contestation,[112] thereby denigrating the reasonable individual, subordinating rational judgement to randomised political outcomes which only take the voting citizens – who are very often quite different from the social citizens – into account. Daniel Thym is absolutely right in this context to state that 'long-term

---

[105] M Keating, 'Social Citizenship, Solidarity and Welfare in Regionalised and Plurinational States' (2009) 13 *Citizenship Studies* 501, 506–510.

[106] Ibid, 506. See also C Barnard, 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?' (2000) 25 *European Law Review* 57.

[107] For a detailed analysis, see K Lenaerts, 'Le développement de l'Union sociale européenne dans la jurisprudence de la Cour de justice' (2008) 9 *ERA Forum* 61; K Lenaerts, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 *European Constitutional Law Review* 101; M Poiares Maduro, 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in P Alston (ed), *The EU and Human Rights* (OUP 1999) 449.

[108] E.g., M Everson, 'A Very Cosmopolitan Citizenship, but Who Pays the Price?', in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen* (Hart Publishing 2012) 145; C Barnard, 'A Proportionate Response to Proportionality in the Field of Collective Action' (2012) *European Law Review* 117; N Reich, 'Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice – Part I/II' (2008) 9 *German Law Journal* 125.

[109] D Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal.*

[110] Ibid; D Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[111] T Pullano, *La citoyenneté européenne: Un espace quasi étatique* (Presses de Sciences Po, 2014); L Azoulai, 'Transfiguring European Citizenship: From Member State Territory to Union Territory', in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights* (CUP 2016 (forthcoming)).

[112] M Kumm, 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' (2010) 4 *Law and Ethics of Human Rights* 1938.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

implications of the social benefits case-law are, from today's viewpoint, less revolutionary than initial analyses suggested'.[113] More disturbing still are the profoundly unjust assumptions behind the *Laval*-crusades, which presume the diminished value of the foreign worker, whose needs are not taken into account. Social rights for the rich and the sacred *status quo* are opposed to the plight of those who actually need protection.[114] In essence, demonstrating against the reflagging of ships or foreign companies providing services in a particular state is logically indistinguishable from racist demonstrations against black workers or rallies against women's participation in the work force.

Protecting the local – type-cast once and for all as a weaker party – from the liberating and empowering function of the EU[115] by refusing to question the potentially false premises on which a local law is frequently built[116] – the fetishisation of the three misleading connections discussed above – is difficult to sell outside of the environment of appeals to the ideal past where the *true demos* and a true social contract reigned supreme: an orthodoxy deprived of any irony and thus uninteresting. The weakness attributed by law undermines the usual understanding of the term, as the attributions frequently fail to take essential elements of reality into account.[117] A Swedish worker in *Laval* is presented in the literature as by default a weaker party deserving protection against an evil Latvian who is the presumed stronger party, having EU law on his side, notwithstanding the yawning abyss dividing the two countries' levels of wealth and opportunity, showing with all clarity the almost inexcusable nationalistic short-sightedness of the defenders of the 'social' cause. Kukovec diagnosed the flaws of the current construction of the European understanding of social justice as follows: 'As structural subordination of various actors of the periphery in the economic and legal structure has not been recognized, the definitions of a weak party in legal vernacular follow a pattern that does not include the weaker parties in terms of the centre/periphery hierarchy.'[118] In the face of the academic criticism that such cases, falsely branded as social, receive, it is a relief that the ECJ and its AGs seem to recognise fully EU citizenship's liberating function and stand up for the law, fending off nationalism.[119]

---

[113] D Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits' in M Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined* (Hart Publishing 2013).

[114] D Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[115] F de Witte, 'The Role of Transnational Solidarity in Mediating the Conflicts of Justice in Europe' (2012) 18 *European Law Journal* 694.

[116] D Kukovec, 'Law and the Periphery' (2015) 21 *European Law Journal*.

[117] Ibid.

[118] D Kukovec, 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[119] AG Jacobs explained the mechanics of this function of EU citizenship in his Opinion in Case C-148/02 *Carlos Garcia Avello v Etat Belge* [2003] ECR I-11613, para 63 (footnotes omitted): 'The concept of "moving and residing freely in the territory of the Member States" is not based on the hypothesis of a single move from one Member State to another, to be followed

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

The strength of European law and of the citizenship it created is that it has emerged as a potent tool to be deployed *against* the 'suffocating bonds' of the nation state.[120] Gianluigi Palombella, Gareth Davies and Will Kymlicka[121] all point in this direction, the latter going as far as connecting the failure to recognise the EU's ability to 'tame and diffuse liberal nationhood'[122] with 'moral blindness'.[123] The EU offers us a legal-political system which is infinitely more complex than perpetually blind-backing the *status quo* and taking the side of the powerful. It is true, however, that for the EU to function well, some sacrifices are bound to be made, the most dear to many usually being the idealised idea of a perfect container-society, happy and self-sufficient.

When ruining this distorted dream,[124] the EU seems to work *against* some of the fundamental premises of social solidarity regulation: nationality is irrelevant – no, France does not love the Frenchmen more than the Walloons – and the bounded territorial scope of the state as a sphere of regulation is constantly questioned and rationalised, inciting, should the story be pushed to the extremes, inter-state competition: Belgians are those 'who *choose* Belgium'.[125] This rather complex story, which is best theorised by Alexander Somek in his numerous brilliant contributions, marks the dawn of cosmopolitan legitimation, as opposed to the political one.[126] Instead of promoting politicised *demos*-style political involvement, the EU appears to promote involvement *precisely* through liberation of the wandering cosmopolitans from the constraints of local – read Member State-level – politics.[127] Political battles and victories are replaced by rationality – with its underlying biases, alas[128] – and

---

by integration into the latter. The intention is rather to allow free, and possibly related or even continuous, movement within a single "area of freedom, security and justice", in which both cultural diversity and freedom from discrimination [are] ensured'.

[120] G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 *International Journal of Constitutional Law* 357, 382; EMH Hirsch-Ballin, *Burgerrechten* (Universiteit van Amsterdam 2011); D Kochenov, '*Mevrouw de Jong Gaat Eten*: EU Citizenship and the Culture of Prejudice' (2011) 6 *EUI Working Paper RSCAS*.

[121] G Palombella, 'Whose Europe? After the Constitution: A Goal-Based Citizenship' (2005) 3 *International Journal of Constitutional Law* 357; W Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in S Benhabib (ed), *Another Cosmopolitanism* (OUP 2006) 134. See also G Davies, 'Humiliation of the State as a Constitutional Tactic', in F Amtenbrink and P van den Bergh (eds), *The Constitutional Integrity of the European Union* (TMC Asser Press 2010).

[122] W Kymlicka, 'Liberal Nationalism and Cosmopolitan Justice', in S Benhabib (ed), *Another Cosmopolitanism* (OUP 2006) 134.

[123] Ibid, 135.

[124] G Davies, *A Time to Mourn – How I Learned to Stop Worrying and Quite Like the European Union* (VU University of Amsterdam 2008).

[125] G Davies, '"Any Place I Hang My Hat?" or: Residence is the New Nationality' (2005) 11 *European Law Journal* 43, 56.

[126] See, notably, A Somek, 'Europe: Political, Not Cosmopolitan' (2014) 20 *European Law Journal* 142.

[127] A Somek, 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* (Hart Publishing 2015).

[128] TH Marshall's typology of citizenship rights could never fit the story of EU citizenship's development. For a detailed analysis, see, G de Búrca, 'Report on the Further Development of Citizenship in the European Union' [2001] *Zeitschrift für Schweizerisches Recht* 39, 50.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

protection from uncomfortable outcomes. On close inspection, however, this presentation of reality is not EU-specific at all, as a similar story has been told by Bourdieu[129] and Žižek.[130] The relationship between social solidarity and citizenship in the EU follows the global trend in full, rather than breaking it.

BIBLIOGRAPHY

Acosta Arcarazo, D (2011), *The Long-Term Residence Status as a Subsidiary Form of EU Citizenship*, Leiden: Brill.

Allott, P (1990), *Eunomia*, Oxford: OUP.

Arendt, H (1979), *The Origins of Totalitarianism* (first published in 1951), San Diego: Harcourt Brace & Co.

Arraiza, JM (2015), 'Good Neighbourliness as a Limit to Extraterritorial Citizenship: The Case of Hungary and Slovakia', in D Kochenov and E Basheska (eds), *Good Neighbourly Relations in the European Legal Context*, Leiden: Brill Nijhoff.

Azoulai, L (2010), 'La citoyenneté européenne, un statut d'intégration sociale', in *Mélanges Jean Paul Jacqué. Chemins d'Europe*, Paris: Dalloz.

Azoulai, L (2013), *L'autonomie de l'individu européen et la question du statut*, *EUI LAW Working Paper 14*, Florence: EUI.

Azoulai, L (2016), 'Transfiguring European Citizenship: From Member State Territory to Union Territory', in D Kochenov (ed), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP.

Badiou, A (2001), *Ethics: An Essay on Understanding of Evil*, London: Verso.

Balkin, JM (2003), 'The Proliferation of Legal Truth' *Harvard Journal of Law and Public Policy* **26** 5.

Barbier, JC (2008), *La longue larche vers l'Europe sociale*, Paris: PUF.

Barnard, C (2000), 'Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware?' *European Law Review* **25** 57.

Barnard, C (2005), 'EU Citizenship and the Principle of Solidarity' in M Dougan and E Spaventa (eds), *Social Welfare and EU Law*, Oxford: Hart Publishing 157.

Barnard, C (2007), 'Social Policy Revisited in the Light of the Constitutional Debate', in C Barnard (ed), *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debat*e, Oxford: OUP 109.

Barnard, C (2012), 'A Proportionate Response to Proportionality in the Field of Collective Action' *European Law Review* 117.

Bauböck, R (2009), 'Global Justice, Freedom of Movement and Democratic Citizenship' *Archives européennes de sociologie* **51** 1.

Bauböck, R and V Guiraudon (2009), 'Introduction: Realignments of Citizenship: Reassessing Rights in the Age of Plural Memberships and Multi-Level Governance' *Citizenship Studies* **13** 439.

Belavusau, U (2008), 'The Case of *Laval* in the Context of the Post-Enlargement EC Law Development' *German Law Journal* **9** 2279.

Bellamy, R (2006), 'The European Constitution Is Dead, Long Live European Constitutionalism' *Constellations* **13** 181 ff.

Bellamy, R (2008), 'Evaluating Union Citizenship: Belonging, Rights and Participation within the EU' *Citizenship Studies* **12** 598.

Berger PL and T Luckmann (1967), *The Social Construction of Reality: A Treatise in the Sociology of Knowledge*, Garden City, NY: Ancor.

Boeles, P (2005), 'Europese burgers en derdelanders: Wat betekent het verbod van discriminatie naar nationaliteit sinds Amsterdam?' *Sociaal-economische wetgeving* **12** 502.

Bosniak, L (2002), 'Constitutional Citizenship Through the Prism of Alienage' *Ohio State Law Journal* **63** 1285.

Bosniak, L (2010), 'Persons and Citizens in Constitutional Thought' *International Journal of Constitutional Law* **8** 9.

[129] A Badiou, *Ethics: An Essay on Understanding of Evil* (Verso 2001).

[130] S Žižek, 'Against Human Rights' (2005) 34 *New Left Review* 10.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

de Búrca, G (2001) 'Report on the Further Development of Citizenship in the European Union' *Zeitschrift für Schweizerisches Recht* 39.
Carens, JH (1987), 'Aliens and Citizens: The Case for Open Borders' *Review of Politics* **49** 250.
Carens, JH (2002), 'Citizenship and Civil Society: What Rights for Residents?' in R Hansen and P Weil (eds), *Dual Nationality, Social Rights and Federal Citizenship in the US and Europe*, New York/Oxford: Randall Books 109.
Chalmers, D (2012), 'The European Redistributive State and a European Law of Struggle' *European Law Journal* **18** 667.
Chwaszcza, C (2009), 'The Unity of People, and Immigration in Liberal Theory' *Citizenship Studies* **13** 451.
Clarke, J (2005), 'Welfare States as Nation States: Some Conceptual Reflections' *Social Policy and Society* **4** 407.
Countouris, N and M Freedland (eds), *Resocialising Europe in a Time of Crisis*, Cambridge: CUP.
Davies, G (2005), '"Any Place I Hang My Hat?" or: Residence is the New Nationality' *European Law Journal* **11** 43.
Davies, G (2007), *Services, Citizenship, and the Country of Origin Principle, Mitchell Working Paper* No 2.
Davies, G (2008), *A Time to Mourn – How I Learned to Stop Worrying and Quite Like the European Union*, Amsterdam: VU University of Amsterdam.
Davies, G (2010), 'Humiliation of the State as a Constitutional Tactic', in F Amtenbrink and P van den Bergh (eds), *The Constitutional Integrity of the European Union*, The Hague: TMC Asser Press.
Debord, G (1996), *La société de spectacle*, Paris: Gallimard.
Dougan, M (2004), 'A Spectre Is Haunting Europe … Free Movement of Persons and Eastern Enlargement', in C Hillion (ed), *EU Enlargement: A Legal Approach*, Oxford: Hart Publishing, 111.
Dougan, M (2009), 'The Spacial Restructuring of National Welfare States within the European Union', in U Neergaard, R Nielsen and LM Roseberry (eds), *Integrating Welfare Function into EU Law: From Rome to Lisbon*, Copenhagen: Djøf Publishing.
Dougan, M, N Nic Shuibhne and E Spaventa (eds) (2012), *Empowerment and Disempowerment of the European Citizen*, Oxford: Hart Publishing.
Dougan, M and E Spaventa (2005), '"Wish You Weren't Here …" New Models of Social Solidarity in the European Union', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law*, Oxford: Hart Publishing.
Epiney, A (2007), 'The Scope of Article 12 EC: Some Remarks on the Influence of European Citizenship' *European Law Journal* **13** 611.
Everson, M (2012), 'A Very Cosmopolitan Citizenship, but Who Pays the Price?', in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen*, Oxford: Hart Publishing 145.
Gerhards, J (2008), 'Free to Move? The Acceptance of Free Movement of Labour and Non Discrimination among Citizens of Europe' *European Societies* **10** 121.
Gerstenberg, O (2015), 'The Question of Standards for the EU: From "Democratic Deficit" to "Justice Deficit"?', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing.
Gibney, MJ (2011), 'The Rights of Non-citizens to Membership' in C Sawyer and BK Blitz (eds), *Statelessness in the European Union*, Cambridge: CUP 41.
Golynker, O (2006), 'Student Loans: The European Concept of Social Justice According to Bidar' *European Law Review* **31** 390.
Groenendijk, K (2013), 'Access for Migrants to Social Assistance: Closing the Frontiers or Reducing Citizenship?', in E Guild, S Carrera and K Eisele (eds), *Social Benefits and Migration: A Contested Relationship and Policy Challenge in the EU*, Brussels: Centre for European Policy Studies.
Hirsch-Ballin, EMH (2011), *Burgerrechten*, Amsterdam: Universiteit van Amsterdam.
Hublet, C (2009), 'The Scope of Article 12 of the Treaty of the European Communities vis-à-vis Third-Country Nationals: Evolution at Last?' *European Law Journal* **15** 757.
Isin, E (2009), 'Citizenship in Flux: The Figure of the Activist Citizen' *Subjectivity* **29** 367.
Isin, E and G Nielsen (eds) (2008), *Acts of Citizenship*, New York: ZED Books.
Joppke, C (2003), 'Citizenship between De- and Re-Ethnicization (I)' *Archive européen de sociologie* **44** 436.
Joppke, C (2007), 'Beyond National Models: Civic Integration Policies for Immigrants in Western Europe' *West European Politics* **30** 1.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

Joppke, C (2008), 'Immigration and the Identity of Citizenship: The Paradox of Universalism' *Citizenship Studies* **12** 533.
Joppke, C (2010), 'The Inevitable Lightening of Citizenship' *European Journal of Sociology* **51** 9.
Keating, M (2009), 'Social Citizenship, Solidarity and Welfare in Regionalised and Plurinational States' *Citizenship Studies* **13** 501.
Kochenov, D (2009), '*Ius Tractum* of Many Faces: European Citizenship and a Difficult Relationship between Status and Rights' *Columbia Journal of European Law* **15** 169.
Kochenov, D (2010), 'Annotation of Case C-135/08 *Rottmann*' *Common Market Law Review* **47** 1831.
Kochenov, D (2010), *Citizenship without Respect: The EU's Troubled Equality Ideal*, Jean Monnet Working Paper, New York: NYU Law School nr 8.
Kochenov, D (2010), 'Regional Citizenships in the EU' *European Law Review* **35** 307.
Kochenov, D (2010), *Rounding up the Circle: The Mutation of Member States' Nationalities under Pressure from EU Citizenship, EUI RSCAS Working Pape*r No 23/2010, Florence: EUI.
Kochenov, D (2011), *Mevrouw de Jong Gaat Eten: EU Citizenship and the Culture of Prejudice EUI RSCAS Working Paper* 6, Florence: EUI.
Kochenov, D (2012), 'Member State Nationalities and the Internal Market: Illusions and Reality' in N Nic Shuibhne and LW Gormley (eds), *From Single Market to Economic Union: Essays in Memory of John A Usher*, Oxford: OUP 245.
Kochenov, D (2013), 'The Citizenship Paradigm' *Cambridge Yearbook of European Legal Studies* **15** 196.
Kochenov, D (2013), 'The Essence of EU Citizenship Emerging from the Last Ten Years of Academic Debate: Beyond the Cherry Blossoms and the Moon?' *International and Comparative Law Quarterly* **62** 97.
Kochenov, D (2013), 'The Right to Have *What* Rights? EU Citizenship in Need of Clarification' *European Law Journal* **19** 502.
Kochenov, D (2014), 'Citizenship for Real: Its Hypocrisy, Its Randomness, Its Price', in A Shachar and R Bauböck (eds), *Should Citizenship Be for Sale?, EUI RSCAS Working Paper* 1 Florence: EUI, 27.
Kochenov, D (2014), 'EU Citizenship without Duties' *European Law Journal* **20** 482.
Kochenov, D (ed) (2016), *EU Citizenship and Federalism: The Role of Rights*, Cambridge: CUP.
Kochenov, D and R Plender (2012), 'EU Citizenship: From an Incipient Form to an Incipient Substance? The Discovery of the Treaty Text' *European Law Review* **37** 369.
Kostakopoulou, D (2003), 'Why Naturalisation?' *Perspectives on European Politics & Sociology* **4** 85.
Kostakopoulou, D (2008), *The Future Governance of Citizenship*, Cambridge: CUP.
Kostakopoulou, D (2009), 'Citizenship Goes Public: The Institutional Design of Anational Citizenship' *Journal of Political Philosophy* **17** 275.
Kostakopoulou, D (2012), 'Political Alchemies, Identity Games and the Sovereign Debt Instability: European Identity in Crisis or the Crisis in Identity-Talk?' *Review of International Affairs* **63** 97.
Kukovec, D (2011), *Whose Social Europe? Institute for Global Law and Policy Paper* no 3 Cambridge, MA: Harvard Law School.
Kukovec, D (2015), 'Law and the Periphery' *European Law Journal I* (forthcoming).
Kukovec, D (2015), 'Taking Change Seriously: The Rhetoric of Justice and the Reproduction of the *Status Quo*', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* Oxford: Hart Publishing.
Kumm, M (2010), 'The Idea of Socratic Contestation and the Right to Justification: The Point of Rights-Based Proportionality Review' *Law and Ethics of Human Rights* **4** 1938.
Kymlicka, W (2006), 'Liberal Nationalism and Cosmopolitan Justice', in S Benhabib (ed), *Another Cosmopolitanism*, Oxford: OUP 134.
Lavaggi, R and M Montefiorio (eds) (2004), *Health Care Provision and Patient Mobility*, Heidelberg: Springer.
Lenaerts, K (2006), 'Contours of a European Social Union in the Case-Law of the European Court of Justice' *European Constitutional Law Review* **2** 101.
Lenaerts, K (2008), 'Le développement de l'Union sociale européenne dans la jurisprudence de la Cour de justice' *ERA Forum* **9** 61.
Maillard, S (2008), *L'émergence de la citoyenneté sociale européenne*, Marseille: Presses Universitaires d'Aix-Marseille.
Martinsen, DS (2005), 'Social Security Regulation in the EU: The De-Territorialisation of Welfare?', in G de Búrca (ed), *EU Law and the Welfare State: In Search of Solidarity*, Oxford: OUP 89.
Mataija, M (2009), 'Case C-158/07, *Jacqueline Förster v. IB-Groep* – Student Aid and Discrimination of Non-Nationals: Clarifying or Emaciating Bidar?' *Columbia Journal of European Law* **15** 59.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

van der Mei, AP (2003), *Free Movement of Persons within the European Community: Cross-Border Access to Public Benefits*, Oxford: Hart Publishing.
van der Mei, AP (2005), 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State' *European Journal on Migration and Law* 7 203.
van der Mei, AP (2009), 'Union Citizenship and the Legality of Durational Residence Requirements for Entitlement to Student Financial Aid' *Maastricht Journal of European and Comparative Law* **16** 477.
Menéndez, AJ (2015), 'Whose Justice? Which Europe?', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing.
Miller, D (1988), 'The Ethical Significance of Nationality' *Ethics* **98** 657.
Minderhoud, P (2009), 'Free Movement, Directive 2004/38 and Access to Social Benefits', in PE Minderhoud and C Trimikliniotis (eds), *Rethinking the Free Movement of Workers. The European Challenges Ahead*, Nijmegen: Wolf 69.
Mundlak, G (2007), 'Industrial Citizenship, Social Citizenship, Corporate Citizenship: I Just Want My Wages' *Theoretical Inquiries in Law* **8** 719.
Nicola F (2015), 'Conceptions of Justice from Below: Distributive Justice as a Means to Address Local Conflicts in European Law and Policy', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?* Oxford: Hart Publishing.
Nic Shuibhne, N (2010), 'The Resilience of EU Market Citizenship' *Common Market Law Review* **47** 1597.
O'Brien, C (2008), 'Real Links, Abstract Rights and False Alarms: The Relationship between the ECJ's "Real Link" Case Law and National Solidarity' *European Law Review* **33** 643.
O'Brien, C (2009), 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' *Common Market Law Review* **46** 1107.
O'Brien, C (2011), 'Case C-310/08 *Ibrahim* Case C-480/08 *Teixiera' Common Market Law Review* **48**(1).
O'Brien, C (2012), 'A Stage, a Spotlight and an Unwritten Script: Frontier Zones and Intersectional Citizens', in M Dougan, N Nic Shuibhne and E Spaventa (eds), *Empowerment and Disempowerment of the European Citizen*, Oxford: Hart Publishing 73.
O'Brien, C (2013), 'I Trade, Therefore I Am: Legal Personhood in the European Union' *Common Market Law Review* **50** 1643.
O'Cinneide, C (2013), 'Completing the Picture: The Complex Relationship between EU Anti-Discrimination Law and "Social Europe"', in N Countouris and M Freedland (eds), *Resocialising Europe in a Time of Crisis*, Cambridge: CUP 118.
O'Gorman, R (2009), *The Proportionality Principle and Union Citizenship. Mitchell Working Paper* No 1, 4–11.
O'Leary, S (2008), *Developing an Ever Closer Union between the Peoples of Europe? Mitchell Working Paper*, Edinburgh, No 6, 15–24.
van Oers, R, E Ersbøll and D Kostakopoulou (eds), *A Re-definition of Belonging?* Leiden: Brill.
Palombella, G (2005), 'Whose Europe? After the Constitution: A Goal-Based Citizenship' *International Journal of Constitutional Law* **3** 357.
Pennings, F (2012), 'EU Citizenship: Access to Social Benefits in Other EU Member States' *International Journal of Comparative Labour Law and Industrial Relations* **28** 307.
Poiares Maduro, M (1999), 'Striking the Elusive Balance between Economic Freedom and Social Rights in the EU', in P Alston (ed), *The EU and Human Rights*, Oxford: OUP 449.
Pullano, T (2014), *La citoyenneté européenne: Un espace quasi étatique*, Paris: Presses de Sciences Po.
Reich, N (2008), 'Free Movement v. Social Rights in an Enlarged Union: The Laval and Viking Cases before the European Court of Justice – Part I/II' *German Law Journal* **9** 125.
Renan, E (1992), *Qu'est-ce qu'une nation? et autres essais politiques* (first published 1882), Paris: Agora.
Rennuy, N (2011), 'Assimilation, Territoriality and Reverse Discrimination: A Shift in European Social Security Law?' *European Journal of Social Law* 289.
Rostek, K and G Davies (2010), *The Impact of Union Citizenship on National Citizenship Policies. European Integration Online Papers*, **10**(5) 1.
Schönberger, C (2007), 'European Citizenship as Federal Citizenship: Some Citizenship Lessons of Comparative Federalism' *Revue européenne de droit public* **19** 61.
Scobbie, I (2005), 'Slouching towards the Holy City: Some Weeds for Philip Allott' *European Journal of International Law* **16** 299.
Shachar, A (2014), 'Dangerous Liasions: Money and Citizenship', in A Shachar and R Bauböck (eds), *Should Citizenship Be for Sale?*, *EUI RSCAS Working Paper* nr 1, 3.
Shaw, J (ed) (2011), *Has the European Court of Justice Challenged the Member State Sovereignty in Nationality Law? EUI RSCAS Working Paper* No 62, Florence: EUI.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

Shklar, J (1992), *The Faces of Injustice*, New Haven, CT: Yale University Press.
Smith, D (1986), *The Ethnic Origin of Nations*, Oxford: Blackwell.
Somek, A (2004), 'Concordantia Catholica: Exploring the Context of European Antidiscrimination Law and Policy', *Transnational Law and Contemporary Problems* **14** 959.
Somek, A (2014), 'Europe: Political, Not Cosmopolitan' *European Law Journal* **20** 142.
Somek, A (2015), 'The Preoccupation with Rights and the Embrace of Inclusion: A Critique', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing.
Spiro, P (2008), *Beyond Citizenship: American Identity after Globalisation*, Oxford: OUP.
Strumia, F (2011), 'Remedying the Inequalities of Economic Citizenship in Europe: Cohesion Policy and the Negative Right to Move' *European Law Journal* **17** 725.
Strumia, F (2013), *Supranational Citizenship and the Challenge of Diversity-Immigrants: Citizens and Member States in the EU*, Leiden: Martinus Nijhoff.
Thym, D (2013), 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits' in M Adams et al (eds), *Judging Europe's Judges: The Legitimacy of the Case Law of the European Court of Justice Examined*, Oxford: Hart Publishing.
Tilley, J and A Heath (2007), 'The Decline of British National Pride' *British Journal of Sociology* **58** 661.
Tyler, I (2010), 'Designed to Fail: A Biopolitics of British Citizenship' *Citizenship Studies* **14** 61.
Van Elsuwege, P and S Adam (2008), 'Situations purement internes, discriminations à rebours et collectivités autonomes après l'arrêt sur *l'Assurances soins flamande*' *Cahiers de droit européen* 655.
Walzer, M (1974), 'Civility and Civic Virtue in Contemporary America' *Sociological Research* **41** 4.
Weiler, JHH (2003), 'In Defence of the *Status Quo*: Europe's Constitutional *Sonderweg*', in JHH Weiler and M Wind (eds), *European Constitutionalism beyond the State*, Cambridge: CUP 7.
Wiener, A (1998), '*European' Citizenship Practice – Building Institutions of a Non-State*, Boulder: Westview Press.
Wiesbrock, A (2010), *Legal Migration to the European Union*, Leiden: Martinus Nijhoff.
Wilkinson, M (2015), 'Politicising Europe's Justice Deficit: Some Preliminaries', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing.
Williams, A (2013), 'The EU, Interim Global Justice and the International Legal Order', in D Kochenov and F Amtenbrink (eds), *The European Union's Shaping of the International Legal Order*, Cambridge: CUP 62.
Williams, A (2015), 'The Problem(s) of Justice in the European Union', in D Kochenov, G de Búrca and A Williams (eds), *Europe's Justice Deficit?*, Oxford: Hart Publishing.
Wind, M (2009), 'Post-National Citizenship in Europe: The EU as a "Welfare Rights Generator?"' *Columbia Journal of European Law* **15** 239.
de Witte, F (2012), 'The Role of Transnational Solidarity in Mediating the Conflicts of Justice in Europe' *European Law Journal* **18** 694.
de Witte, F (2013), 'EU Law, Politics, and the Social Question' *German Law Journal* **14** 581.
Zilbershats, Y (2001), 'Reconsidering the Concept of Citizenship' *Texas International Law Journal* **36** 689.
Žižek, S (2015), 'Against Human Rights' *New Left Review* **34** 10.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:46:29PM
via University College London (UCL)

3. Social security in the case law of the European Court of Human Rights

*Lieneke Slingenberg**

I. INTRODUCTION

In a handbook on European social security law, a chapter on the case law of the European Court of Human Rights (ECtHR or the Court) cannot be absent. Even though the European Convention on Human Rights (ECHR or the Convention) is primarily concerned with civil and political rights, the European Court of Human Rights increasingly provides protection in the field of social security.[1] Already in 1979, the Court held in *Airey*:

> Whilst the Convention sets forth what are essentially civil and political rights, many of them have implications of a social or economic nature. The Court therefore considers, like the Commission, that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; there is no water-tight division separating that sphere from the field covered by the Convention.[2]

In a more recent case, however, the Court switched the emphasis and stressed that 'although many of the rights it contains have implications of a social or economic nature, the Convention is essentially directed at the protection of civil and political rights'.[3] In addition, in a case in which the applicant complained about the lack of an effective remedy to complain about the authorities' failure to provide better social housing, the Court held that '[e]ven though there is no watertight division separating the sphere of social and economic rights from the field covered by the Convention. …

* Some parts of this chapter, primarily Section II, are based on my book, L Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014).

[1] With the term 'social security' in this chapter I mean all schemes providing benefits, whether in cash or in kind, to provide protection against one of the social risks mentioned in ILO Convention no. 102 on minimum standards of social security, complemented by the social condition of 'need' or 'destitution'. See the definition adopted by FM Noordam and GJ Vonk, *Hoofdzaken socialezekerheidsrecht* (Kluwer 2011) 3–5.

[2] *Airey v Ireland* App no 6289/73 (ECHR, 9 October 1979), para 26. Repeated in *Annoni di Gussola and Others v France* App nos 31819/96 and 33293/96 (ECHR, 14 November 2000), para 56; and *Sidabras and Dziautas v Lithuania* App nos 55480/00 and 59330/00 (ECHR, 27 July 2004), para 47.

[3] *N v the United Kingdom* App no 26565/05 (ECHR, 27 May 2008), para 44.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

the right invoked by the applicant in the case at hand clearly belongs to the realm of socio-economic rights, which is not covered by the Convention'.[4]

This means that the ECHR can provide protection in the field of social security, but only if this protection results from the enjoyment of one of the civil and political rights laid down in the Convention.[5] This chapter will discuss three different ways in which protection in the field of social security results from ECHR rights.[6] First, Section II will discuss the relevance of the right to property of Article 1 of Protocol No 1 for the field of social security. This section will show that this article, as interpreted by the Court, primarily provides (limited) protection against a decline in social security protection. Section III will discuss the relevance of Article 14 ECHR for the field of social security and will show that case law of the Court on this article resulted in a broadening of the personal scope of national social security schemes. These first two protections offered by the ECHR in the field of social security are, therefore, relevant for situations in which states have set up social security schemes. Article 1 of Protocol No 1 and Article 14 do not oblige states to have in place certain social security schemes, but only provide protection in case a state has already chosen to provide for social security. Next to the 'accessory' protection offered by Article 1 of Protocol No 1 and Article 14, it seems that a cautious development can be detected in the Court's case law towards a more autonomous protection in the field of social security. Increasingly, the Court interprets Convention articles as containing certain positive obligations for the state in order to prevent destitution and ill-health. This development will be discussed in Section IV.

II. THE RIGHT TO PROPERTY: PROTECTION AGAINST A DECLINE IN SOCIAL SECURITY PROTECTION

Article 1 of Protocol No 1 protects the peaceful enjoyment of possessions and sets the conditions under which states may deprive individuals of possessions and the conditions under which states may control the use of property and to secure payment of taxes and other contributions or penalties. This section will discuss whether social security

---

[4] *Balakin v Russia* App no 21788/06 (ECHR, 4 July 2013), para 33.

[5] See also C O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' [2008] *European Human Rights Law Review* 583–605; E Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 *Erasmus Law Review* 397–425.

[6] There are more ways in which protection in the field of social security results from ECHR rights. For example, Art 6 has been held to be applicable in social security cases, as a result of which important procedural rights apply (see also Chapter 5 in this volume). This chapter, however, is limited to cases that are relevant for the question whether the state should (continue to) provide or may withdraw or deny certain social security benefits to/from certain individuals. See for an elaborate overview and analysis of the protection of socio-economic rights under the ECHR, IE Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

benefits can fall under the scope of this article; in what circumstances a denial or withdrawal of social security benefits amounts to an interference with the right to property; and, finally, in what circumstances an interference with the right to property is justified.

II.i Social Security Benefits as Possessions

The term 'possessions' is an autonomous concept and has been given a broad meaning by the Court.[7] It extends in the Court's case law in fact to all matters that have an economic value, such as company shares, an internet domain name and goodwill in a business.[8] It therefore comes as no surprise that the Court has also identified social security benefits as possessions. This was decided by the Court for the first time in *Gaygusuz*.[9] This judgment did, however, not make clear whether it was necessary, in order for a social security benefit to qualify as a possession within the meaning of Article 1 of Protocol No 1, to have a direct link between the payment of contributions and the entitlement to the benefit.[10] In later case law, the Court side-stepped the question of whether the payment of contributions was a necessary condition for a benefit to be qualified as a possession.[11] The Court acknowledged this lack of clarity in its case law in the admissibility decision in *Stec* and examined afresh the question whether a claim to a non-contributory social security benefit could attract the protection of Article 1 of Protocol No 1. It held:

> The Court's approach to Article 1 of Protocol No 1 should reflect the reality of the way in which welfare provision is currently organised within the Member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status. … Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No 1. Moreover, to exclude benefits paid for out of general

---

[7] F Van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 1996) 865; RCA White and C Ovey, *The European Convention on Human Rights* (Oxford University Press 2010) 481.

[8] Ibid.

[9] *Gaygusuz v Austria* App no 17371/90 (ECHR, 16 September 1996).

[10] While the Court first noted that the entitlement to emergency assistance was linked to the payment of contributions to the unemployment insurance fund (para 39), it subsequently stated that Art 1 of Protocol no 1 was applicable 'without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay "taxes or other contributions"' (para 41). See also GJ Vonk, 'Social Security and the Right to Property: Gaygusuz and After' in JP Loof, H Ploeger and A van der Steur (eds), *The Right to Property, the Influence of Article I Protocol No. 1 ECHR on Several Fields of Domestic Law* (EM Meijers Institute 2000) 145–155.

[11] IE Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 192–203.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

> taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax.[12]

The Court therefore concluded that social security benefits fall under the scope of Article 1 of Protocol No 1 '[w]here an individual has an assertable right under domestic law to a welfare benefit'. This means that irrespective of the way a certain benefit is financed, if it concerns a scheme providing for payment of benefits as of right, Article 1 of Protocol No 1 is applicable to the benefits concerned.

II.ii Interference with Social Security Rights

The next question is which state behaviour with regard to social security benefits amounts to an interference with the right to property.[13] In general, for a property right to be established under Article 1 of Protocol No 1, it should concern an existing right or the person concerned should have a 'legitimate expectation' of obtaining the effective enjoyment of the right.[14] The Court generally states that this article does not contain a right to acquire property.[15] With regard to social security benefits, the Court held in *Stec* that Article 1 of Protocol No 1 'places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme'. More specifically this means that the person concerned should satisfy the various statutory conditions established by law for awarding the benefit, unless these conditions are discriminatory.[16] Accordingly, if a benefit is denied or withdrawn because the person concerned does not satisfy, or ceases to satisfy, the legal conditions laid down in domestic law for the grant of social or welfare benefits, there is no interference with the rights under Article 1 of Protocol No 1.[17] If, on the other hand, the person concerned does fulfil all statutory conditions for acquiring the benefit, or had a legitimate expectation to that end, then a denial or withdrawal will qualify as an

---

[12] *Stec and others v the United Kingdom* App nos 65731/01 and 65900/01 (ECHR, 6 July 2005).

[13] The Court does not pay specific attention to this step in all cases, sometimes it just assumes that Art 1 of the Protocol is applicable, see I Leijten, 'Social Security as a Human Rights Issue in Europe – *Ramaer and Van Willigen* and the Development of Property Protection and Non-Discrimination under the ECHR' (2013) 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 194.

[14] F Van Dijk et al (eds), *Theory and Practice of the European Convention on Human Rights* (Intersentia 1996) 869.

[15] See, e.g., *Stec and others v the United Kingdom* App nos 65731/01 and 65900/01 (ECHR, 6 July 2005), para 53; *Moskal v Poland* App no 10373/05 (ECHR, 15 September 2009), para 38.

[16] In cases of alleged discriminatory conditions, the relevant test is 'whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question' (*Stec and others v the United Kingdom* App nos 65731/01 and 65900/01 (ECHR, 6 July 2005), para 55).

[17] *Rasmussen v Poland* App no 38886/05 (ECHR, 28 April 2009), para 71; and *Raviv v Austria* App no 26266/05 (ECHR, 13 March 2012), para 61. See also D Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press 2009) 661.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

interference with the right to property. An expectation to acquire certain benefits is considered by the Court to be 'legitimate' if it is 'of a nature more concrete than a mere hope' and if it is based on a legal provision or a legal act such as a judicial decision.[18]

The case of *Damjanac* shows that the Court sometimes rather extensively examines the quality of the domestic legislation and decision-making in this regard. Even though the Court emphasises in this case that it cannot substitute its view for that of the domestic authorities as to whether an individual complies with the statutory conditions and that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, it also states that it must satisfy itself that the domestic legislation is clear, precise and foreseeable with regard to the specific legal requirements and that the decisions of the domestic authorities do not disclose any arbitrariness, are sufficiently reasoned, and, if appropriate, provide references to the relevant domestic case law and practice.[19] Hence, if the domestic legislation is not sufficiently precise, or the domestic decision-making is not of sufficient quality, the person concerned may have a legitimate expectation that benefits will be granted and a denial of benefits will in that case amount to an interference with the right to property.

Also the compulsory affiliation and compulsory contributions to a certain social security scheme may result in a legitimate expectation to be entitled to payment of the benefits under that scheme. Accordingly, in *Klein* the Court held that the 'compulsory affiliation to an old-age pension scheme, based on the equally compulsory membership of a professional organisation during the exercise of a profession, may also give rise to the legitimate expectation to receive pension benefits at the point of retirement and constitutes a possession within the meaning of Article 1 of Protocol No 1'. Therefore, the refusal to grant the applicant an old-age pension because he did not fulfil one additional legal condition constituted an interference with the right to property according to the Court.[20]

The case of *Moskal* makes clear that also if a benefit has clearly been granted erroneously, a subsequent withdrawal of the benefit can qualify as an interference with the right to property. In this case, a property right was generated 'by the favourable evaluation of the applicant's dossier attached to the pension application which had been lodged in good faith and by the Social Security Board's recognition of the right'.[21] In *B v the United Kingdom*, the Court held that the *Moskal* approach only applies if the mistake is made by the authorities. If a benefit has erroneously been granted as a result of an individual's own fault or failure to report information, a subsequent withdrawal does not amount to an interference with the right to property.[22]

A situation that will occur more frequently and that will amount to an interference with property rights as well is the situation in which the authorities adopt an amendment to the relevant legislation, resulting in a change in statutory conditions for

---

[18] See for example *Ramaer and Van Willigen v the Netherlands* App no 34880/12 (ECHR, 23 October 2012).

[19] *Damjanac v Croatia* App no 52943/10 (ECHR, 24 October 2013).

[20] *Klein v Austria* App no 57028/00 (ECHR, 3 March 2011), paras 45–48.

[21] *Moskal v Poland* App no 10373/05 (ECHR, 15 September 2009), para 45. See also, among other judgments of the same date against Poland *Świątek v Poland* App no 8578/04 (ECHR, 4 December 2012) and *Rusin v Poland* App no 25360/04 (ECHR, 2 October 2012).

[22] App no 36571/06 (ECHR, 14 February 2012), para 39.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

the award of a benefit. If in such cases the amount of a benefit is reduced or discontinued, this may constitute an interference with possessions which requires justification.[23] In such cases, it seems necessary that the entitlement to the benefit already exists and that it does not merely concern the (legitimate expectation to the) entitlement to a future right once a social risk arises.[24]

In the situations described above, the Court generally concludes that there is an interference with the general right to peaceful enjoyment of possessions as laid down in the first sentence of Article 1 of Protocol No 1, without paying separate attention to the second or third sentence of this Article.

II.iii Justification for the Interference

If the Court has established that a certain situation amounts to an interference with the right to property, the next question is whether the interference is justified under Article 1 of Protocol No 1. In order to be compatible with the right to peaceful enjoyment of possessions, an interference with property rights must strike a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights. Furthermore, the issue of whether a fair balance has been struck becomes relevant only once it has been established that the interference in question satisfied the requirement of lawfulness and pursues aims in the public interest.[25]

If the interference has been caused by a denial or withdrawal of social security benefits while the applicant did have a legitimate expectation to receive the benefits, owing to unclear legislation, the denial will not satisfy the requirement of lawfulness. Such a conclusion will make it unnecessary for the Court to ascertain whether a fair balance has been struck between the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights in finding a violation of Article 1 of Protocol No 1.[26]

As regards the 'public interest requirement', the Court has ruled that the national authorities enjoy a wide margin of appreciation and the Court will respect the legislature's judgment as to what is 'in the public interest' unless that judgment is manifestly without reasonable foundation.[27] The Court explained this by considering

---

[23] *Hoogendijk v the Netherlands* App no 58641/00 (ECHR, 6 January 2005); *Goudswaard-Van der Laans v The Netherlands* App no 75255/01 (ECHR, 22 September 2005); *Rasmussen v Poland* App no 38886/05 (ECHR, 28 April 2009), para 71; *Iwaszkiewicz v Poland* App no 30614/06 (ECHR, 26 July 2011); *Stefanetti and others* App no 21838 (ECHR, 15 April 2014).

[24] Cf *Ramaer and Van Willigen v the Netherlands* App no 34880/12 (ECHR, 23 October 2012).

[25] See e.g. *Hoogendijk v the Netherlands* App no 58641/00 (ECHR, 6 January 2005); *Iwaszkiewicz v Poland* App no 30614/06 (ECHR, 26 July 2011).

[26] *Damjanac v Croatia* App no 52943/10 (ECHR, 24 October 2013).

[27] *Moskal v Poland* App no 10373/05 (ECHR, 15 September 2009), para 61; *Wieczorek v Poland*, App no 18176/05 (ECHR, 8 December 2009), para 59; *Iwaszkiewicz v Poland* App no 30614/06 (ECHR, 26 July 2011), para 43.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

that 'the decision to enact laws concerning pensions or welfare benefits involves consideration of various economic and social issues'.[28]

As regards the requirement of a fair balance, the Court has ruled that a fair balance will not be struck if the person concerned bears an individual and excessive burden.[29] In general, the threshold for establishing such an excessive burden is high, as a consequence of which the state is allowed a wide power to interfere with the right to peaceful enjoyment of possessions.[30] Harris et al note that the Court has deferred extensively to the decisions of national bodies.[31] A violation will generally not be found by the Court if individuals are confronted with a reasonable and commensurate reduction of benefits, such as for example less than half of a pension,[32] or if the legislature affords them a transitional period within which to adjust themselves to the new scheme.[33] However, case law of the Court does indicate that this might be different if the benefit concerned has been entirely withdrawn and the person concerned is not eligible for other welfare benefits and is therefore left without any provision at all from the social security system.[34] More generally, the Court has held that a deprivation of the entirety of a pension is likely to breach Article 1 of Protocol No 1.[35] In addition, in *Stefanetti and others*, the Court concluded that Article 1 of Protocol No 1 was violated because of a reduction of two-thirds of a pension. In this case, the Court paid particular attention to the amount of contributions paid by the applicants, the average amount of pension in the Contracting State and the fact that the pensions awarded to the applicants generally should be considered as providing for only basic commodities, as a result of which the reductions 'undoubtedly affected the applicants' way of life and hindered its enjoyment substantially'.[36]

In *Moskal*, the Court held that if fulfilment of the statutory conditions is reassessed and a mistake is discovered which has been caused by the authorities themselves,

---

[28] *Valkov and others v Bulgaria* App nos 2033/04 et al (ECHR, 25 October 2011), para 91.

[29] *Iwaszkiewicz v Poland* App no 30614/06 (ECHR, 26 July 2011), para 44.

[30] See also I Leijten, 'Social Security as a Human Rights Issue in Europe – *Ramaer and Van Willigen* and the Development of Property Protection and Non-Discrimination under the ECHR' (2013) 73 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 208.

[31] D Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press 2009) 695.

[32] See, e.g., *Maggio and others v Italy* App nos 46286/09 et al (ECHR, 31 May 2011).

[33] *Lakićević and others v Montenegro and Serbia* App nos 27458/06 et al (ECHR, 13 December 2011).

[34] *Asmundsson v Iceland* App no 60669/00 (ECHR, 12 October 2004). (However, in this case, the Court put a lot of weight on the fact that the vast majority of disability pensioners had continued to receive benefits at the same level as previously, whereas a small minority completely lost their entitlements); *Hoogendijk v the Netherlands* App no 58641/00 (ECHR, 6 January 2005); *Iwaszkiewicz v Poland* App no 30614/06 (ECHR, 26 July 2011), para 59.

[35] *Stefanetti and others* App nos 21838 et al (ECHR, 15 April 2014), para 59. See also *Lakićević and others v Montenegro and Serbia* App nos 27458/06 et al (ECHR, 13 December 2011) in which the Court concluded that the entire suspension of payment of pensions violated Art 1 of Protocol No 1, even though these pensions only constituted a part of the applicants' income (they also worked part time) and *Klein v Austria* App no 57028/00 (ECHR, 3 March 2011).

[36] App nos 21838/10 and others (ECHR, 15 April 2014), para 64.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

without any fault of a third party, a stricter proportionality approach must be taken in determining whether the burden borne by the person concerned was excessive.[37] In this case, the mistake of the authorities left the applicant with 50 per cent of her expected income, and it was only after proceedings lasting three years that she was able to obtain this benefit at all. The Court held, therefore, that Article 1 of Protocol No 1 was violated.

II.iv Concluding Observations

This section shows that while social security benefits generally fall under the protection of Article 1 of Protocol No 1 of the ECHR, due to the broad margin of appreciation left to the state, the Court does not often rule that this article has been violated. However, if the state ends the payment of (almost) the entirety of a person's pension without granting some kind of a transitional period or if the state withdraws benefits that were erroneously provided due to a mistake of the authorities, the burden borne by the person concerned might be considered to be 'excessive' by the Court, which violates Article 1 of Protocol No 1.[38]

III. THE PROHIBITION OF DISCRIMINATION: BROADENING THE PERSONAL SCOPE OF SOCIAL SECURITY SCHEMES?

III.i Introduction

The ECHR contains two provisions that prohibit discrimination. The first one is Article 14 ECHR, which provides that:

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

This article provides for an accessory right, as it applies to the 'enjoyment of the rights and freedoms set forth in this Convention'. In order to raise a claim for discrimination in the field of social security, it is therefore necessary to show that the social security rights complained of fall within the ambit of another ECHR provision.

The foregoing section has showed that many social security claims fall under the scope of Article 1 of Protocol No 1. In order to be able to complain about discrimination on the basis of this article, case law shows that you do not have to fulfil

---

[37] *Moskal v Poland* App no 10373/05 (ECHR, 15 September 2009).

[38] According to Pennings, '[i]t seems that the Court's approach can be explained as a typical human rights' perspective – "is the outcome problematic in an individual case?" – rather than developing consistent criteria for when the infringement of benefit rights is allowed and when it is not' (F Pennings, 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?' (2013) 9 *Utrecht Law Review* 125; an updated version is published as Chapter 6 in this volume).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

all statutory conditions of the benefit scheme in question. In *Stec*, the Court held that in a case concerning a complaint under Article 14 in conjunction with Article 1 of Protocol No 1, 'the relevant test is whether, but for the condition of entitlement about which the applicant complains, he or she would have had a right, enforceable under domestic law, to receive the benefit in question'.[39] This means that every claim about a discriminatory qualifying condition of a social security scheme that provides for payment of benefits as of right, falls under the scope of Article 14 ECHR.

The Court has also acknowledged that social security benefits that promote family life, such as child benefits or parental leave allowances, fall within the ambit of Article 8 ECHR.[40] Also insufficient (or denial of) public funding of health care can under certain circumstances fall under the scope of Article 8.[41] Hence, Article 14 ECHR will generally be applicable in the case of alleged discrimination in contributory or non-contributory social insurance or social assistance schemes providing benefits as of right or with regard to discrimination in providing health care.

With the entry into force of Protocol no 12 in 2005, the ECHR also contains an independent, general, prohibition of discrimination. Article 1 of Protocol No 12 reads:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Hence, this article applies irrespective of the right in question. This article is therefore applicable in all cases concerning social security rights, even in cases where the social security benefit is not considered to be a 'possession' in the sense of Article 1 of Protocol No 1. For example, in *Ramaer and Van Willigen*, the applicants complained that, firstly, their health care insurance contracts had been annulled, as a result of which they lost their entitlements under those contracts, and secondly, as non-residents they had had their entitlements reduced to basic public health care in their countries of residence unless they were prepared to face additional expenses. The Court concluded that the applicants' expectations were not based on a legal provision or a judicial decision. 'Rather, they were based on the hope to see their insurance contracts continued, or renewed on terms no less favourable for them than those which they enjoyed previously.' Consequently, the Court held that there was no interference with a 'possession' within the meaning of Article 1 of Protocol No 1, as a result of which Article 14 was not applicable in this case. To the contrary, Article 1 of Protocol No 12 did apply (and was held not to be violated by the Court).

---

[39] *Stec and others v the United Kingdom* App nos 65731/01 et al (ECHR, 6 July 2007), para 55.

[40] *Petrovic v Austria* App no 20458/92 (ECHR, 27 March 1998), para 29; *Niedzwiecki v Germany* App no 58453/00 (ECHR, 25 October 2005), para 31; and *Okpisz v Germany* App no 59140/00 (ECHR, 25 October 2005), para 32.

[41] *Pentiacova and 48 Others v Moldova* App no 14462/03 (ECHR, 4 January 2005).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

The scarce case law on Article 1 of Protocol No 12 shows that the Court adopts the same approach under this article as under Article 14. The approach adopted by the Court under Article 14 is that this article has been violated if there is a difference in treatment for persons in relevantly similar situations, where there is no objective and reasonable justification for this difference in treatment. An objective and reasonable justification will be accepted by the Court if there is a legitimate aim of the difference in treatment and if there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. In examining the existence of an objective and reasonable justification, the Court grants the Contracting States a certain margin of appreciation. The scope of this margin will vary according to the 'circumstances, the subject matter and its background'.[42] In this respect, one of the relevant factors may be 'the existence or non-existence of common ground between the laws of the Contracting States'.[43] Another very relevant factor in establishing the scope of the margin of appreciation is, as this section will also show, the nature of the ground on which the discrimination is based.[44]

This section will examine case law about differences in treatment in social security legislation. All these cases concern Article 14 ECHR. The discussion will be limited to cases concerning differences of treatment based on nationality, immigration status, place of residence and sex.

III.ii Distinctions of Treatment Based on Nationality

The European Court of Human Rights has developed vast case law on distinctions based on nationality in social security schemes. It has made clear that distinctions based solely and directly on nationality are in violation of Article 14 ECHR. The Court reached this conclusion for the first time in *Gaygusuz*.[45] This case concerned an application by a Turkish national for an allowance under the Austrian unemployment emergency assistance scheme. This application was rejected exclusively on the ground that he did not have Austrian nationality and did not fall within any of the categories exempted from that condition. The Court deals with the case in a strikingly short way.[46] After determining that Article 14 is applicable in this case (in conjunction with Article 1 of Protocol No 1), the Court holds that the ground of distinction in this case is nationality, which is covered by Article 14. The Court observes that the Contracting States enjoy a certain margin of appreciation, but adds that 'very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention'. The Court applies this 'very weighty reasons test' for the first time to the ground of nationality in this case, without providing any reasons for doing so. In assessing

[42] See, e.g., *Andrejeva v Latvia* App no 55707/00 (ECHR, 18 February 2009), para 82.

[43] *Rasmussen v Denmark* App no 8777/79 (ECHR, 28 November 1984), para 40; *Petrovic v Austria* App no 20458/92 (ECHR, 27 March 1998), para 38; *SL v Austria* App no 45330/99 (ECHR, 9 January 2003), para 41.

[44] *Bah v the United Kingdom* App no 56328/07 (ECHR, 27 September 2011), para 47.

[45] *Gaygusuz v Austria*, App no 17371/90 (ECHR, 16 September 1996).

[46] See also MB Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *Human Rights Law Review* 689–721.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

whether the distinction made on the basis of nationality was justifiable in this case, the Court pays much attention to the question of comparability of Mr Gaygusuz with Austrian nationals. In this regard, the Court finds relevant that Mr Gaygusuz was legally resident in Austria, had worked in Austria at certain times and had paid contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals. In addition, the Court notes that he satisfies all other statutory conditions for the award of emergency assistance. Accordingly, he was 'in a like situation to Austrian nationals as regards his entitlement thereto'.[47] Therefore, the Court concludes that the difference in treatment between Austrians and non-Austrians as regards entitlement to emergency assistance is not based on any objective and reasonable justification. Hence, the Court does not pay attention to the question whether the aim advanced by the government to exclude non-nationals (i.e. that 'the State has special responsibility for its own nationals and must take care of them and provide for their essential needs'[48]) was legitimate and whether there was a reasonable relationship of proportionality between the means employed and the aim. The Court only adds that the argument of the Austrian government that Austria was not bound by any reciprocal agreement with Turkey does not stand up, as Austria 'undertook, when ratifying the Convention, to secure "to everyone within [its] jurisdiction" the rights and freedoms defined in section I of the Convention'.[49]

This approach was repeated by the European Court of Human Rights in the case of *Koua Poirrez v France*.[50] This case concerned the application of an Ivory Coast national for an allowance for disabled adults under a French social benefit scheme. This application was refused solely on the ground that he was neither a French national nor a national of a country that had signed a reciprocity agreement in respect of the social benefit in question. The Court's assessment of the justification of this difference in treatment based on nationality is very similar to its assessment in the *Gaygusuz* case. The Court first repeats that very weighty reasons have to be put forward before it could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention. It subsequently assesses the justifiability of the difference of treatment by paying attention to the comparability of Mr Koua Poirrez with French nationals and nationals from countries that have signed a reciprocity agreement. Also in this case, the Court finds relevant in this regard that Mr Koua Poirrez was legally resident in France and that he satisfied all other statutory conditions entitling him to the invalidity benefit. In addition, the Court notes that he receives the minimum welfare benefit in France, which is not subject to the nationality condition. Accordingly, he was in a similar situation as that of French nationals or nationals of a country that had signed a reciprocity agreement as regards his right to receive the

---

47 Para 48.

48 Para 45.

49 Para 51.

50 App no 40892/98 (ECHR, 30 September 2003). Interestingly, this case was first brought before the Court of Justice of the EU (F Pennings, 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?' (2013) 9 *Utrecht Law Review* 121).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

benefit. The difference of treatment was therefore not based on any objective and reasonable justification.

Also in the cases of *Luczak v Poland*[51] and *Andrejeva v Latvia*,[52] the European Court of Human Rights applied the very weighty reasons test to distinctions based on nationality. In these cases, however, the Court did examine, next to the comparability test, whether there was a legitimate aim and whether the rules concerned were proportional to that aim. In both cases, the Court concluded that the exclusion of non-nationals from certain social security benefits violated Article 14 ECHR.

Hence, these cases show that the justification for distinctions based on nationality in the field of social security benefits must meet stringent standards. The Court carefully examines whether the arguments put forward by the state are of sufficient importance to justify the distinction. Accordingly, case law of the Court seems to indicate that states can no longer reserve their social security schemes for their own nationals only. A scheme that excludes all non-nationals from its scope has until now always been found by the Court to violate Article 14.

III.iii Distinctions Based on Immigration Status

The cases discussed above all concern social security schemes from which *all* non-nationals were denied access to or enjoyment of a certain benefit scheme. The Court has, however, also issued a number of judgments in which the distinction was not (solely) based on nationality, but (also) on the immigration status of the person concerned. In these cases, not every non-national was excluded from the benefit scheme, but only certain categories of non-nationals with a specific (weak or illegal) immigration status. Even though these cases did not all concern social security in the strict sense, they merit description here since they did concern access to social benefits for non-nationals and since the Court makes a number of relevant general remarks in these cases.

The first relevant cases in this respect are the cases of *Niedzwiecki v Germany*[53] and *Okpisz v Germany.*[54] In these cases, the applicants complained of discrimination in the German law on child benefits. Under that law, aliens were only entitled to child benefits if they were in the possession of an unlimited or provisional residence permit. Both applicants were Polish nationals and were only in the possession of a limited residence permit, as a result of which they were not entitled to child benefits. The Court holds in both cases that it is not 'called upon to decide generally to what extent it is justified to make distinctions, in the field of social benefits, between holders of different categories of residence permits'.[55] Accordingly, the Court does not classify the distinctions made in the German law as distinctions between nationals and aliens, but as distinctions between holders of different categories of residence permit. Subsequently, the Court reaches the conclusion, without providing any reasons, that there are

---

[51] App no 77782/01 (ECHR, 27 November 2007).
[52] App no 55707/00 (ECHR, 18 February 2009).
[53] *Niedzwiecki v Germany* App no 58453/00 (ECHR, 25 October 2005).
[54] *Okpisz v Germany* App no 59140/00 (ECHR, 25 October 2005).
[55] Para 33 of the *Niedzwiecki* judgment and para 34 of the *Okpisz* judgment.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

not sufficient reasons justifying the different treatment with regard to child benefits of aliens who were in possession of a stable residence permit, on the one hand, and those who were not, on the other. The Court does not refer to the 'very weighty reasons test'. However, in reaching this conclusion, the Court seems to rely heavily on a decision of the German Federal Constitutional Court concerning the same issue.[56] This national court did apply a 'very weighty reasons test' and found no justification for the distinction.

A second relevant case on distinctions based on immigration status with regard to social benefits is the case of *Ponomaryovi v Bulgaria*.[57] In this case two Russian nationals complained that they had been discriminated against because, unlike Bulgarian nationals and aliens having permanent residence permits, they had been required to pay school fees to pursue their secondary education. Both applicants had been in possession of a permanent residence permit until their eighteenth birthdays, but did not have the money to pay the fees for an independent residence permit, which they needed in order to continue residing in Bulgaria lawfully. According to the Court, the distinction as regards the obligation to pay school fees is due exclusively to their nationality and immigration status. It then repeats its general principles that, on the one hand, states are usually allowed a wide margin of appreciation when it comes to general measures of economic or social strategy, but, on the other hand, that very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention. However, it adds a general reason for applying a strict scrutiny in this case, as it 'cannot overlook the fact that, unlike some other public services … education is a right that enjoys direct protection under the Convention' – as it is expressly enshrined in Article 2 of Protocol No 1 to the Convention – and since secondary education plays an ever-increasing role in today's 'knowledge-based societies'.[58]

The Court does not explicitly apply a comparability test and starts its justification test by observing that a state 'may have legitimate reasons for curtailing the use of resource-hungry public services – such as welfare programmes, public benefits and health care – by short-term and illegal immigrants, who, as a rule, do not contribute to their funding'.[59] In addition, the Court holds in general that the state may also, in certain circumstances, justifiably differentiate between different categories of aliens residing in its territory.

> For instance, the preferential treatment of nationals of Member States of the European Union – some of whom were exempted from school fees when Bulgaria acceded to the Union … – may be said to be based on an objective and reasonable justification, because the Union forms a special legal order, which has, moreover, established its own citizenship.[60]

---

[56] See para 33 of the *Niedzwiecki* judgment and para 34 of the *Okpisz* judgment ('Like the Federal Constitutional Court …').

[57] *Ponomaryovi v Bulgaria* App no 5335/05 (ECHR, 21 June 2011).

[58] Paras 55–58.

[59] Para 54.

[60] Ibid. The Court refers to the cases of *Moustaquim v Belgium* App no 12313/86 (ECHR, 18 February 1991) and *C v Belgium* App no 21794/93 (ECHR, 7 August 1996). On the basis of

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

In assessing the proportionality of the national measure, the Court observes that 'the applicants were not in the position of individuals arriving in the country unlawfully and then laying claim to the use of its public services'. To the contrary, the Court observes that 'the authorities had no substantive objection to their remaining in Bulgaria, and apparently never had any serious intention of deporting them'. The applicants, moreover, had taken steps to regularise their situation. Accordingly, 'any considerations relating to the need to stem or reverse the flow of illegal immigration clearly did not apply to the applicants' case'.[61] Finally, the Court attaches importance to the fact that it was not the applicants' choice to settle in Bulgaria and pursue their education there, as they arrived there with their mother at a very young age, and to the fact that the relevant law did not make provision for a possibility to request an exemption from the payment of school fees. In the 'specific circumstances of the present case', the Court concludes that the requirement to pay school fees on account of the applicants' nationality and immigration status violated Article 14 ECHR in conjunction with Article 2 of Protocol No 1.

As Dembour notes, the Court adopts a very casuistic approach in this case, as opposed to the more general approach in the *Gaygusuz* case.[62] Accordingly, even though this case makes clear that legal residence is not required *per se* in order to be entitled to equal treatment with nationals with regard to social benefits, distinctions based on the kind of immigration status will only violate Article 14 on the basis of specific individual circumstances. In this case, the fact that the authorities did not have any substantive objection to the applicants' presence on the territory and the fact that they had been living in Bulgaria for a rather long period of time seems to be of importance. In addition, the specific right that has been denied is of relevance here; it seems that denial of rights that derive direct protection under the ECHR, such as the right to education, requires a stricter scrutiny by the Court.

This approach was upheld by the Court in the case of *Bah v the United Kingdom*.[63] In this case, the Court distinguishes for the first time explicitly between distinctions based on nationality and distinctions based on immigration status. In this case, the applicant was refused a priority placement on a list for social housing on the basis of her son's immigration status. The applicant's minor son had conditional leave to remain in the United Kingdom, the condition being that he must not have recourse to public funds. As he was therefore considered as being 'subject to immigration control' within the meaning of relevant domestic laws, he was disregarded in the determination of whether the applicant was in priority need for social housing. The parties in this case disagreed on the relevant ground of distinction. The applicant submitted that she was discriminated against on the ground of nationality, whereas the government contended that the basis of differential treatment was immigration status. The Court decides,

---

these cases, it could already be argued that preferential treatment of EU nationals would not violate Art 14 (F Pennings, 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?' (2013) 9 *Utrecht Law Review* 122–123).

[61] *Ponomaryovi v Bulgaria* App no 5335/05 (ECHR, 21 June 2011), para 60.

[62] MB Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *Human Rights Law Review* 689–721.

[63] App no 56328/07 (ECHR, 27 September 2011).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

without much discussion, that it was the son's 'conditional legal status, and not the fact that he was of Sierra Leonean national origin, which resulted in his mother's differential treatment under the housing legislation'.[64] Apparently, the Court does not pay attention to the fact that parents with children of British nationality could, by definition, not be subjected to this differential treatment.[65] The Court subsequently rejects the government's argument that immigration status cannot amount to a ground of distinction for the purposes of Article 14. The fact that it is not an inherent characteristic, but rather a status conferred by law, does not preclude it from amounting to an 'other status' for the purposes of Article 14. However, the specific ground of discrimination is relevant for the purposes of Article 14, as 'the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation'.[66] The Court observes that immigration status is subject to an element of choice. In this regard, the Court notes that while the applicant entered the country as an asylum seeker, she was not granted refugee status and cannot, therefore, be described as a person who was present in a Contracting State because, as a refugee, she could not return to her country of origin. The Court therefore concludes that given the element of choice involved in immigration status, 'while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality'.[67] The Court then proceeds to examine whether the differential treatment is objectively justified. It pays some attention to the question of comparability, but it does not consider it necessary to determine conclusively whether the applicant and her son were in an analogous situation to a relevant comparator, since it concludes that the differential treatment was objectively justified anyway. In this context, the Court states that it is justifiable to differentiate between those who are in the United Kingdom unlawfully or on the condition that they have no recourse to public funds, and those who are not. In addition, the legislation pursued a legitimate aim according to the Court, namely allocating a scarce resource fairly between different categories of claimants. The Court also finds the effect of the differential treatment not disproportionate to the legitimate aim, as the applicant and her son were never actually

---

[64] Para 44.

[65] Arguably, put this way, the differential treatment can be understood as being based on nationality. In the case of *Rangelov v Germany* (App no 5123/07 (ECHR, 22 March 2012)), a case not related to social security, the Court seems to adopt this position. This case is about the preventive detention of a Bulgarian national against whom an expulsion order had been made. In view of this expulsion order, social therapy and relaxations of his detention conditions had not been offered. According to the Court, the applicant was and could only be subject to an expulsion order as a foreign national and it concludes that he was treated differently compared to German nationals in a similar situation (para 95). The Court therefore applies the 'very weighty reasons test' (para 102). See on the question whether distinctions based on immigration status could also be seen as distinctions directly based on nationality: L Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014) 92–98.

[66] Para 47.

[67] Ibid. See for critical comments on this approach MB Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *Human Rights Law Review* 689–721.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

homeless and since there were some duties imposed by legislation for local authorities had the threat of homelessness actually manifested itself.

The foregoing section shows that for distinctions based exclusively on nationality, i.e. if a social security scheme excludes all non-nationals, very weighty reasons are required, as a result of which Article 14 is generally held to be violated. This section shows, however, that if distinctions are based on immigration status that is subject to an element of choice, i.e. with regard to voluntary migration or rejected asylum seekers, no such very weighty reasons are required. In such cases, Article 14 will only be violated on the basis of specific individual circumstances. *Ponomaryovi* shows that substantive objections by the state against a person's presence on the territory may be of relevance in this regard. *A contrario*, the *Bah* case seems to indicate that if immigration is *not* subject to an element of choice, i.e. with regard to forced migration such as refugees, very weighty reasons are still required in order to justify an exclusion from social benefits.

III.iv Distinctions Based on Place of Residence

Another condition that is often used in social security schemes in order to establish the personal scope of application, is a(n) (ordinary) residence condition. The Court has issued a number of judgments on the acceptability of such conditions under Article 14. All these cases concern complaints from persons who are excluded from certain social security benefits or whose social security benefits are reduced because they reside in a state other than the state that grants the benefits. To my knowledge, there are no cases (yet) on the exclusion of persons from social security benefits because they, while present on the territory of the state that grants the benefits, have not (yet) established an ordinary residence in that state.

With regard to complaints from persons who are excluded from certain benefits or certain advantages because they reside in another state, the Court generally pays a lot of attention to the question of comparability. An important case on this issue is the case of *Carson and others v the United Kingdom.*[68] In this case, the applicants complained that the failure to uprate their pensions amounted to discrimination on the ground of place of residence. Under UK law, non-resident pensioners were disqualified from receiving uprated pensions, unless they resided in states which had concluded a bilateral reciprocal social security agreement with the United Kingdom which provided for the pensions to be uprated in line with UK inflation. The Court first notes that place of residence constitutes an aspect of personal status for the purposes of Article 14. Next, it examines whether the applicants are in a relevantly similar position to other pensioners, regardless of their country of residence. The fact that the applicants had paid contributions to the pension scheme was not sufficient in this regard according to the Court. The Court further notes that the aim of the pension scheme is to ensure a certain minimum standard of living for persons living in the United Kingdom and the scheme is, therefore, primarily designed to serve the needs of those resident in the United Kingdom. The Court notes that this 'essentially national character of the social security system' is also recognised in other relevant international instruments, such as

[68] App no 42184/05 (ECHR, 16 March 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

ILO Conventions and the European Code of Social Security. The Court concludes, while also taking into account the range of economic and social variables which apply from country to country and the fact that the applicants do not contribute to the UK economy, for example by paying taxes, that it is hard to draw any genuine comparison between UK resident pensioners and pensioners living elsewhere. Nor does the Court consider that the applicants are in a relevantly similar position to pensioners living in countries with which the United Kingdom has concluded a bilateral agreement providing for uprating. The Court stresses in this regard that states clearly have a right under international law to conclude bilateral social security treaties and states may enter into such treaties if they consider it to be in their interest. Since the applicants are not in a relevantly similar position to pensioners living in the United Kingdom or living in a state that has entered into a bilateral social security agreement with the United Kingdom, Article 14 was not violated in this case.

The Court took the same approach in the case of *Efe v Austria*.[69] In this case, the applicant complained under Article 14 about the refusal to grant him family allowance and tax credits for maintenance payments because his children were not resident in Austria. The Court stressed again the right of states to enter into bilateral social security conventions and the fact that the social security system in Austria was primarily designed to cater for the needs of the resident population. For these reasons, the Court held that the applicant was not in a relevantly similar position as Austrian residents claiming family allowances, as a result of which Article 14 was not violated.

In *Pichkur v Ukraine*,[70] the Court, however, reached a different conclusion. The applicant in this case complained under Article 14 about the denial of his retirement pension on the ground that he did not reside in Ukraine. The Court considered that this case should be distinguished from *Carson* because the entitlement to the pension itself had been made dependent on the applicant's place of residence and not just the right to indexation of the pension. This resulted in this case in a situation 'in which the applicant, having worked for many years in his country and having contributed to the pension scheme, had been deprived of it altogether, on the sole ground that he no longer lived in Ukraine'. The Court therefore concluded that, with respect to the entitlement to the pension itself, the applicant was in a relevantly similar situation to pensioners who resided in Ukraine. The Court therefore had to examine whether the difference in treatment could be justified. The Court noted in this respect that the authorities had not brought forward any justifications. In addition, the Court held, on its own motion, that the fact that other relevant international instruments, such as ILO Convention 102 and the European Code of Social Security, allow for a suspension of a pension as long as the person concerned is absent from the territory of the state concerned, would not be a sufficient justification. After all, 'the Court is not prevented from defining higher standards on the basis of the Convention than those contained in other international legal instruments'. In addition, the Court noted that

> the rise of population mobility, the higher levels of international cooperation and integration, as well as developments in the area of banking services and information technologies no

[69] *Efe v Austria* App no 9134/06 (ECHR, 8 January 2013).
[70] *Pichkur v Ukraine* App no 10441/06 (ECHR, 7 November 2013).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

> longer justify largely technically motivated restrictions in respect of beneficiaries of social security payments living abroad, which may have been considered reasonable in the early 1950s when the 1952 ILO Convention [No 102] … was drafted.

The Court concluded that the difference of treatment was, therefore, in breach of Article 14, in conjunction with Article 1 of Protocol No 1.

This latter case leaves open a number of questions. First of all, the question is how the different conclusions on *Efe* and *Pichkur*, both judged in the same year, can be explained. Just like *Pichkur*, *Efe* did not concern a complaint about indexation, but about the entitlement to the benefit itself. Is the approach of the Court in *Pichkur* the new approach of the Court that will henceforth be applied to all social security schemes that apply a residence condition? Or is this approach limited to schemes concerning retirement pensions? And would it be possible for states to argue that distinctions based on place of residence for the entitlement to a retirement pension are objectively and reasonably justified? Hopefully, later case law will answer these questions.

The tentative conclusion is that in the light of *Pichkur*, the burden of proof is on the state to show that the denial of social security benefits to non-residents is objectively and reasonably justified. The fact that international social security conventions generally allow for such a denial is in any case no sufficient justification. On the other hand, denial of indexation of social security benefits is generally allowed under Article 14 and does not need to be justified.

III.v Distinctions on the Ground of Sex

The final ground of discrimination discussed in this section is the ground of sex. The Court has ruled a number of times that distinctions made by states between men and women in social security schemes violated Article 14. An example is the *Van Raalte* case.[71] In this case, the male, childless, unmarried applicant over 45 years of age complained that the levying of contributions under the General Child Care Benefits Act was discriminatory, since women in the same situation did not have to pay contributions under this Act. The Court starts by observing that very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of sex as compatible with the Convention. The Court concluded that there was no objective and reasonable justification for the difference of treatment based on sex. To this end, the Court observed that just as women over 45 may give birth to children, there are, on the other hand, men of 45 or younger who may be unable to procreate; that an unmarried childless woman aged 45 or over may well become eligible for benefits under the Act in question, for example if she marries a man who already has children from a previous marriage; and that the argument that to levy contributions under a child care benefits scheme from unmarried childless women would impose an unfair emotional burden on them might equally well apply to unmarried childless men or to childless couples.

Another violation of Article 14 because of discrimination on the ground of sex in a social security scheme was found by the Court in the case of *Wessels-Bergervoet v the*

[71] *Van Raalte v the Netherlands* App no 20060/92 (ECHR, 21 February 1997).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

Netherlands.[72] In this case, Article 14 was violated because a married women was not insured under the General Old Age Pensions Act during periods that her husband was not insured, whereas there was no such rule for married men. Again, there was no objective and reasonable justification for this distinction between men and women, according to the Court. The Court considered it relevant that the Convention had already come into force in the Netherlands in 1954 and that the inequality of treatment only materialised in 1989 once the applicant received her old-age pension, when, given the prevailing social attitudes at that time, the aim pursued by the legal provisions concerned could no longer be upheld.

Also in other cases on alleged sex discrimination, the Court pays much attention to changing social attitudes through the passage of time. Despite the application of the 'very weighty reasons test' to distinctions made on the ground of sex, changing social attitudes over time and the absence of European common ground on this issue might therefore result in the conclusion that Article 14 has not been violated. For example in *Stec*, the applicants complained about a difference in pensionable ages for men and women. The Court observed that the differential pensionable ages were at their origin intended to correct factual inequalities between men and women and had therefore been objectively justified, 'until such time as social conditions had changed so that women were no longer substantially prejudiced because of a shorter working life'.[73] The Court notes that '[t]his change, must, by its very nature, have been gradual, and it would be difficult or impossible to pinpoint any particular moment when the unfairness to men caused by differential pensionable ages began to outweigh the need to correct the disadvantaged position of women'.[74] Taking into account the absence of a common standard among the Contracting States, the Court therefore concluded that the United Kingdom could not be criticised for not having started earlier on the road towards a single pensionable age. In reaching this conclusion, the Court also took into account 'the extremely far-reaching and serious implications, for women and for the economy in general'.[75]

The original aim of correcting factual differences between men and women, combined with the absence of a common standard and the gradual changes in relevant legislation, might explain the different outcomes in *Stec* and *Wessels-Bergervoet*. Also in *Runkee and White*,[76] the Court explicitly made a distinction between widow's pension, which was originally intended to correct factual inequalities between men and women, and widow's payment, where the benefits in question were designed to ease the financial hardship faced by a spouse in the immediate aftermath of bereavement and to assist the surviving spouse bringing up dependent children alone. Article 14 was only violated because of the difference in treatment with regard to widow's payment, not with regard to widow's pension.

---

[72] *Wessels-Bergervoet v the Netherlands* App no 34462/97 (ECHR, 4 June 2002).

[73] *Stec and others v the United Kingdom* App nos 65731/01 and 65900/01 (ECHR, 12 April 2006), para 62.

[74] Ibid.

[75] Para 65.

[76] *Runkee and White v the United Kingdom* App no 42949/98 (ECHR, 10 May 2007).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

The approach in *Stec* is very similar to the approach of the Court in the earlier case of *Petrovic*,[77] which concerned the complaint of a father against the denial of a parental leave allowance, which was only available for women at that time. The Court held that, in the absence of a common standard in this field at the material time, and the gradual manner in which the Austrian legislator introduced changes in its legislation on parental leave allowance, reflecting the evolution of society in that sphere, Article 14 had not been violated.

On the issue of parental leave, however, case law of the Court shows that the judgment of the Court can also change over time. In *Konstantin Markin*,[78] which also concerned a complaint of a father against the denial of parental leave, the Court noted that:

> The relevant international and comparative-law material … demonstrates that the evolution of society – which began in the 1980s as acknowledged in the Petrovic case – has since significantly advanced. It shows that in a majority of European countries … the legislation now provides that parental leave may be taken by … men and women, while the countries limiting the parental leave entitlement to women are in a small minority … . It follows from the above that contemporary European societies have moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition. The Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States concerning this issue.[79]

This development of a common standard was an important reason for the Court to conclude that in this case, Article 14 had been violated.

With regard to pensions, however, the Court seems to take a more cautious approach. In *Andrle*[80] the Court concluded that Article 14 had not been violated, and paid a lot of attention, with reference to (the Chamber decision in) *Konstantin Markin*, to the difference between parental leave and a pension scheme. It held that:

> [U]nlike the pension scheme, parental leave is a short-term measure which does not affect the entire lives of members of society. It is related to today's life of those concerned whereas the pension age reflects and compensates for inequalities of former times. In the Court's opinion, the amendments of the parental leave system referred to in the case of Konstantin Markin do not involve changes to the subtle balance of the pension system, do not have serious financial ramifications and do not alter long-term planning, as might be the case with the pension system, which forms a part of national economic and social strategies.

Just as in *Stec*, the Court therefore took the possible far-reaching consequences of a finding of a violation of Article 14 into account and held this to be a relevant difference between parental leave and a pension scheme.

Finally, the case of *Zeman*[81] makes clear that even though the Court sometimes leaves room for the gradual elimination of distinctions in social security schemes based

---

77 *Petrovic v Austria* App no 20458/92 (ECHR, 27 March 1998).
78 *Konstantin Markin v Russia* App no 30078/06 (ECHR, 22 March 2012).
79 Para 140.
80 *Andrle v The Czech Republic* App no 6268/08 (ECHR, 17 February 2011).
81 *Zeman v Austria* App no 23960/02 (ECHR, 29 June 2006).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

on sex, Member States are not allowed to introduce new laws during this process that further differentiate between men and women and that frustrate the planned equalisation. In this case, the reform towards equality between women and men was already effectively under way and the final target of equal treatment should have been reached on 1 January 1995. At the very last moment, in December 1994, new legislation was introduced that frustrated this process. The Court held that very strong reasons would have to be put forward to justify this and concluded that the government had not forwarded any convincing reason. Article 14 had therefore been violated.

The foregoing analysis shows that with regard to distinctions based on sex in social security schemes, the Court leaves more room for Contracting Parties to gradually adjust differences in their schemes and pays more attention to changing social attitudes over time than to distinctions based on nationality. Whereas both grounds of discrimination are suspect as they require 'very weighty reasons', only distinctions based exclusively on nationality almost automatically result in a violation of Article 14. Perhaps an explanation for this difference lies in the different consequences. As Dembour concludes, the *Gaygusuz* case law actually 'targeted a type of direct discrimination (on grounds of nationality, in the field of social security, affecting legally resident aliens) which was by then already exceptional in Europe'.[82] The case law discussed in this section shows that the Court indeed takes the scope of possible consequences into account.

IV. POSITIVE OBLIGATIONS: PROTECTION AGAINST DESTITUTION AND ILL-HEALTH

IV.i Introduction

The case law discussed above is relevant for situations in which the state does provide for certain social security benefits. A final question that will be discussed in this chapter is whether the case law of the European Court of Human Rights also contains positive obligations for states to prevent destitution and ill-health, i.e. positive obligations to grant certain social security benefits to persons in need. This section is concerned with protection for persons who are not detained by the state. Since persons in detention find themselves completely under control of the state, the European Court of Human Rights has found that the state is, as a rule, responsible for guaranteeing adequate living conditions.[83] This section will discuss whether the state can also be held responsible for poor living conditions under the Convention for persons who are not detained.

---

[82] MB Dembour, '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' (2012) 12 *Human Rights Law Review* 720.

[83] See L Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014) 293–294. See also E Palmer, 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' (2009) 2 *Erasmus Law Review* 410–412.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

IV.ii Protection against Destitution

The most relevant case for this section is the case of *MSS v Belgium and Greece*.[84] In this case, the Court ruled for the first time that a Contracting State had violated Article 3 ECHR because of poor living conditions. This case concerned the complaint of an asylum seeker from Afghanistan who travelled through Greece to Belgium, where he lodged an asylum application. On the basis of the EU Dublin Regulation, Belgium sent him back to Greece, as this was the country in which he first entered the European Union. In his complaint against Greece, the applicant alleged, inter alia, that the poor detention and living conditions for asylum seekers in Greece violated Article 3 ECHR. The Court held that Greece had indeed violated Article 3 of the ECHR because of their inaction, leaving MSS to fend for himself on the streets for months.

On the basis of this case and earlier case law it can be argued that the Court's approach under Article 3 ECHR with regard to positive obligations should be interpreted as consisting of two distinguishable steps: the Court generally examines whether the treatment complained of reaches the minimum level of severity and whether the state can be held responsible for this treatment.[85]

The Court explicitly accepted for the first time that a state can be held responsible for poor living conditions under Article 3 in the case of *Budina v Russia*.[86] In this case, the disabled applicant complained that her pension was too small for survival. The Court considered that it could not be said that the state authorities had imposed any direct ill-treatment on the applicant, but that it could not exclude that 'State responsibility could arise for "treatment" where an applicant, in circumstances wholly dependent on State support, found herself faced with official indifference when in a situation of serious deprivation or want incompatible with human dignity'.[87] Since the minimum level of severity had not been reached in this case, Article 3 had not been violated by the state.

The Court referred to *Budina* in its judgment in the *MSS v Belgium and Greece* case, but also recalled earlier case law that Article 3 cannot be interpreted as obliging the High Contracting Parties to provide everyone within their jurisdiction with a home and that Article 3 does not entail any general obligation to give refugees financial assistance to enable them to maintain a certain standard of living. The Court referred in this

---

[84] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011).

[85] For more elaborate discussion on these two steps, see L Slingenberg, *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality* (Hart Publishing 2014), 287–292. See also C O'Cinneide, 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' [2008] *European Human Rights Law Review* 583–605.

[86] In the case of *Larioshina v Russia* the Court had already found that a complaint about a wholly insufficient amount of pension may, in principle, raise an issue under Article 3, but the Court did not examine the question of state responsibility explicitly and concluded that the minimum level of severity had not been reached (App no 56869/00 (ECHR, 23 April 2002)). See on this case further IE Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 181–182.

[87] *Budina v Russia* App no 45603/05 (ECHR, 18 June 2009).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

regard to its judgment in the case of *Müslim v Turkey*, which also concerned a complaint of an asylum seeker about precarious living conditions in the host state. In this judgment the Court had ruled, in a strikingly short way, that it did not find anything in the documents of the case that could entail the responsibility of the state for the living conditions of the applicant.[88] In *MSS*, the Court explicitly did not depart from its judgment in *Müslim*, but held that:

> [t]he Court is of the opinion, however, that what is at issue in the instant case cannot be considered in those terms. Unlike in the above-cited Müslim case… the obligation to provide accommodation and decent material conditions to impoverished asylum seekers has now entered into positive law and the Greek authorities are bound to comply with their own legislation, which transposes Community law, namely Directive 2003/9 laying down minimum standards for the reception of asylum seekers in the Member States … . What the applicant holds against the Greek authorities in this case is that, because of their deliberate actions or omissions, it has been impossible in practice for him to avail himself of these rights and provide for his essential needs.[89]

Hence, state responsibility is engaged in this case, since the Greek authorities were legally required to provide housing and adequate living conditions to asylum seekers. This is, in my view, the most important difference with the case of *Müslim v Turkey.* Thus, the reference to Directive 2003/9/EC by the Court should, in my opinion, be understood as an argument for holding the Greek authorities responsible for the alleged ill-treatment. This reading is confirmed by the Court in the case of *SHH v the United Kingdom* in which the Court summarises its *MSS* judgment by stating that:

> It held that the conditions in which the applicant was living reached the Article 3 threshold and found Greece to be responsible for the breach of that Article due to the inaction of the Greek authorities despite their positive obligations under both the European Reception Directive and domestic legislation regarding the provision of accommodation and decent material conditions to asylum seekers.[90]

This means that a state can be held responsible under Article 3 if it intentionally withholds certain benefits from persons where it is legally obliged to provide these benefits. Accordingly, in order for state responsibility to arise with regard to poor living conditions, it seems that the Court requires deliberate, and not merely negligent, conduct from the state (*cf* '*official* indifference' in the *Budina* case). In *Sufi and Elmi v the United Kingdom*, the Court explained that general poverty or the lack of sufficient

---

[88] *Müslim v Turkey* App no 53566/99 (ECHR, 26 April 2005), para 86. The Court considered that the applicant did not appear to have been prevented from maintaining the standard of living which he himself had chosen on seeking refuge in Turkey. In addition, the Court held that although the situation of the applicant was difficult, it was undoubtedly no worse than that of any other citizen who was less well off than others.

[89] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011), para 250.

[90] *SHH v the United Kingdom* App no 60367/10 (ECHR, 29 January 2013), para 76. See also the summary of the *MSS* case App no 4714/06 in *Ndikumana v the Netherlands* (ECHR, 6 May 2014), para 44.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

resources to deal with a naturally occurring phenomenon should not be seen as being caused by intentional acts or omissions of the state.[91]

An intentional failure to comply with domestic legal requirements might, however, not be enough to engage responsibility, as the Court subsequently held in *MSS*:

> The Court attaches considerable importance to the applicant's status as an asylum seeker and, as such, a member of a particularly underprivileged and vulnerable population group in need of special protection … . It notes the existence of a broad consensus at the international and European level concerning this need for special protection, as evidenced by the Geneva Convention, the remit and the activities of the UNHCR and the standards set out in the European Union Reception Directive.[92]

Accordingly, another factor relevant for state responsibility is the vulnerability of the person concerned. Apart from referring to the broad consensus at the international and European level, the Court does not provide any arguments as to why asylum seekers should be considered to be particularly underprivileged and vulnerable.[93] In the context of detention conditions, the Court held that the applicant, being an asylum seeker, 'was particularly vulnerable because of everything he had been through during his migration and the traumatic experiences he was likely to have endured previously'.[94] The relevance of vulnerability for deciding on social rights under Article 3 ECHR has been confirmed by the Court in subsequent case law.[95] Apparently, state responsibility under Article 3 ECHR for poor socio-economic circumstances does not exist for all persons on the territory, but only for persons who belong to a particularly vulnerable population group. Indeed, the Court has held that states cannot be held responsible for the living conditions of illegal immigrants who do not apply for asylum, and are therefore not considered to be members of particularly underprivileged and vulnerable population groups.[96]

To conclude, the state can be held responsible for poor living conditions outside the context of detention. The Court then seems to demand a kind of deliberate or intentional act by the state, for example by requiring that the state, despite a (domestic) legal obligation to do so, does not provide for adequate living conditions. In addition, vulnerability of the person concerned is relevant for accepting state responsibility.

---

[91] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/0 (ECHR, 28 June 2011), paras 281–282.

[92] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011), para 251.

[93] Judge Sajó states in his partly concurring and partly dissenting opinion that the concept of vulnerable groups in the Court's case law refers to groups that were historically subjected to prejudice with lasting consequences, resulting in their social exclusion. In his view, asylum seekers do not fulfil these conditions; they are not socially classified, and consequently treated, as a group.

[94] *MSS v Belgium and Greece* App no 30696/09 (ECHR, 21 January 2011), para 232.

[95] *RR v Poland* App no 27617/04 (ECHR, 26 May 2011); *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 June 2011); *Aden Ahmed v Malta* App no 55352/12 (ECHR, 23 July 2013); *Tarakhel v Switzerland* App no 29217/12 (ECHR, 4 November 2014).

[96] *Halimi v Austria and Italy* App no 53852/11 (ECHR, 18 June 2013).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

After having established that the state could be held responsible for the poor living conditions in *MSS*, the Court went on to examine whether the living conditions reached the threshold of Article 3. It held:

> It observes that the situation in which the applicant has found himself is particularly serious. He allegedly spent months living in a state of the most extreme poverty, unable to cater for his most basic needs: food, hygiene and a place to live. Added to that was the ever-present fear of being attacked and robbed and the total lack of any likelihood of his situation improving. It was to escape from that situation of insecurity and of material and psychological want that he tried several times to leave Greece.[97]

To conclude, the Court considered that 'such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention'.[98] Hence, the Court explicitly mentions food, hygiene and a place to live as a person's most basic needs. The situation of persons who are unable to meet these basic needs for a significant period of time, coupled with the lack of any likelihood of this situation improving, apparently reaches the minimum level of severity of Article 3. The applicant in this case had to endure these poor conditions for several months. As regards the lack of prospects of any improvement of his situation, the Court considered that the situation was linked to his status as an asylum seeker and to the fact that his asylum application had not yet been examined by the Greek authorities. The Court was therefore of the opinion that, 'had they examined the applicant's asylum request promptly, the Greek authorities could have substantially alleviated his suffering'.[99] Another way of alleviating the suffering is by providing asylum seekers access to the labour market. Such access must, however, be a realistic alternative and must actually enable the person concerned to provide for his basic needs. As regards the situation in Greece, the Court observes that

> in practice access to the job market is so riddled with administrative obstacles that this cannot be considered a realistic alternative … . In addition the applicant had personal difficulties due to his lack of command of the Greek language, the lack of any support network and the generally unfavourable economic climate.[100]

In *Sufi and Elmi v the United Kingdom*,[101] the Court held, with reference to its *MSS* judgment, that the conditions in camps for refugees and internally displaced persons in Somalia were sufficiently dire as to amount to treatment reaching the threshold of Article 3. This case concerned a complaint lodged against the United Kingdom by two applicants against their expulsion to Somalia.[102] The Court started by summarising its

---

[97] Para 254.
[98] Para 263.
[99] Para 262.
[100] Para 261.
[101] *Sufi and Elmi v the United Kingdom* App nos 8319/07 and 11449/07 (ECHR, 28 June 2011).
[102] An important aspect of this judgment, albeit less relevant for the purposes of this chapter, is that the Court confirmed that as regards complaints about *expulsion* to dire humanitarian

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

approach in *MSS* as requiring 'to have regard to an applicant's ability to cater for his most basic needs, such as food, hygiene and shelter, his vulnerability to ill-treatment and the prospect of his situation improving within a reasonable time-frame'.[103] Consequently, it held that although humanitarian assistance is available in some of these camps, due to extreme overcrowding, access to shelter, water and sanitation facilities is 'extremely limited'. In other camps, there was only very limited access to food and water, and shelter appeared to be 'an emerging problem'. Apparently, persons should not only theoretically be able to cater for their basic needs, but this possibility should be real and effective. The Court subsequently observed that the inhabitants of such camps had very little prospect of their situation improving within a reasonable timeframe, as they were either not permitted to leave, or, although permitted to leave the camps, only able to return to places in Somalia that were considered to be unsafe by the Court. Consequently, there was little prospect of their situation improving while the conflicts in Somalia continued. The case of *Ndikumana v the Netherlands* shows that the minimum level of severity is not reached if an asylum seeker has to sleep on the streets for two nights before he is admitted to a reception centre.[104]

In the case of *Mohammed Hussein and others v the Netherlands and Italy* the Court makes clear that the existence of 'some shortcomings' in the general situation and living conditions of asylum seekers in Italy is not enough to reach the threshold of seriousness of Article 3. The Court notes in this respect that 'a detailed structure of facilities and care to provide for the needs of asylum seekers' exists in Italy and that improvements have been implemented in order to remedy some of the failings.[105] In *Tarakhel*[106] however, the Court stressed that with regard to minor asylum seekers, who are 'extremely vulnerable', the Swiss authorities should obtain assurances from the Italian authorities that on their arrival in Italy the applicants will be received in facilities and in conditions adapted to the age of the children, and that the family will

---

conditions, two different 'threshold tests' exist. If the authorities of the country of *origin* can be held responsible, through intentional acts or omissions, for the poor conditions, then the general test, as identified in the *MSS* case, applies. On the other hand, if the poor conditions in the country of origin emanate from 'natural causes', such as illness, the lack of sufficient resources, poverty or drought, then expulsion will only reach the threshold in very exceptional cases on the basis of compelling grounds. This 'exceptional threshold test' was first identified by the Court in the case of *N v the United Kingdom*. The distinction between these two 'threshold tests' is not relevant for the purposes of this chapter, since this chapter is not concerned with *expulsion* to poor humanitarian conditions, but with the humanitarian conditions in the host state itself. The 'exceptional threshold test' does therefore not apply. In the case of *Sufi and Elmi*, the regular test applied, since the poor living conditions in the camps emanated from the situation of general violence in Somalia, which was due to direct and indirect actions of the parties to the conflict. In addition, the Court attached a lot of weight to the fact that the situation had been greatly exacerbated by al-Shabaab's refusal to permit international aid agencies to operate in the areas under its control (para 282).

[103] Para 283.

[104] *Ndikumana v the Netherlands* App no 4714/06 (ECHR, 6 May 2014), para 47.

[105] *Mohammed Hussein and others v the Netherlands and Italy* App no 27725/10 (ECHR, 2 April 2013), para 78. See also *Mohammed Hassan and others v the Netherlands and Italy* App no 40524/10 and others (ECHR, 28 August 2013), para 179.

[106] *Tarakhel v Switzerland*, App no 29217/12 (ECHR, 4 November 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

be kept together. Hence, with regard to children, even if they are accompanied by their parents, the threshold of seriousness under Article 3 will be reached earlier.

In brief, poor living conditions will only reach the threshold of Article 3 if the (vulnerable) person concerned is unable to effectively cater for his most basic needs (i.e. housing, food and sanitary conditions) and therefore lives in a state of the most extreme poverty, provided that there is little prospect of any improvement of the situation within a reasonable timeframe. The mere lack of (or shortcomings in) accommodation or the inability to buy other necessary articles such as clothing is in general not serious enough. With regard to children, the threshold of seriousness will be reached if their living conditions are not adapted to their age.

IV.iii Protection against Ill-health

The Court's case law on positive obligations in the field of health care is most developed under Article 2.[107] The Court generally holds in cases about Article 2 that the first paragraph of this article 'enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction'.[108] With regard to the provision of health care, the Court generally holds that 'it cannot be excluded that the acts and omissions of the authorities in the field of health care policy may in certain circumstances engage their responsibility under the positive limb of Article 2'.[109] With respect to the scope of the state's positive obligations in the provision of health care, the Court held that: '[a]n issue may arise under Article 2 where it is shown that the authorities of a contracting state put an individual's life at risk through the denial of health care which they have undertaken to make available to the population generally.'[110] Hence, the standard of health care offered to the general public seems to be decisive.[111] As the Court held in the case of *Pentiacova and 48 others v Moldova*:

---

[107] Other provisions are also of relevance to the right to health, such as Articles 3, 8 and 10 (see IE Koch, *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff Publishers 2009) 59–112), but with regard to positive obligations to actually provide health care (outside the prison context), Article 2 turns out to be most relevant.

[108] See e.g., *Osman v the United Kingdom* App no 23452/94 (ECHR, 28 October 1998), para 115; *Cyprus v Turkey* App no 25781/94 (ECHR, 10 May 2001), para 219; *Mastromatteo v Italy* App no 37703/97 (ECHR, 24 October 2002), para 67.

[109] *Powell v the United Kingdom* App no 45305/99 (ECHR, 4 May 2000); *Nitecki v Poland* App no 65653/01 (ECHR, 21 March 2002); *Pentiacova and others v Moldova* App no 14462/03 (ECHR, 4 January 2005 (dec)); *Panaitescu v Romania*, App no 30909/06 (ECHR, 10 April 2012), para 28; *Mehmet Şentürk and Bekir Şentürk v Turkey* App no 13423/09 (ECHR, 9 April 2013), para 79.

[110] *Cyprus v Turkey* App no 25781/94 (ECHR, 10 May 2001), para 219; *Nitecki v Poland* App no 65653/01 (ECHR, 21 March 2002); *Pentiacova and others v Moldova* App no 14462/03 (ECHR, 31 May 2007); *Makuc and others v Slovenia* App no 26828/06 (26 June 2012); *Mehmet Şentürk and Bekir Şentürk v. Turkey* App no 13423/09 (ECHR, 9 April 2013), para 88.

[111] *Cf Nitecki v Poland* App no 65653/01 (ECHR, 21 March 2002); *Pentiacova and others v Moldova* App no 14462/03 (ECHR, 4 January 2005).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

> While it is clearly desirable that everyone should have access to a full range of medical treatment, including life-saving medical procedures and drugs, the lack of resources means that there are, unfortunately, in the Contracting States many individuals who do not enjoy them, especially in cases of permanent and expensive treatment.[112]

In addition, for a positive obligation to arise under Article 2, it is necessary that an individual's life is put at risk through the denial of health care and that the government ought to be aware of that risk. For example, in the case of *Cyprus v Turkey*, the applicant government complained that the enclaved Greek Cypriots and Maronites were denied access to medical services. The Court held that although 'medical visits were indeed hampered' and 'in certain cases delays did occur', 'it has not been established that the lives of any patients were put in danger on account of delay in individual cases'.[113] In this case, the Court considered also that it had not been established that the authorities 'deliberately withheld medical treatment from the population concerned or adopted a practice of delaying the processing of requests of patients to receive medical treatment in the south'.[114] Article 2 was therefore not violated according to the Court.

In other cases, the Court did find a violation of the state's positive obligation under Article 2. In these cases, health care had erroneously been denied, contrary to domestic law. For example in *Panaitescu v Romania*,[115] the applicant was entitled under domestic law, as confirmed by domestic court decisions, to be provided with medicines free of charge for the disease which finally led to his death. However, that right was repeatedly contested, mainly on bureaucratic grounds, with the result that he was not able to properly pursue his prescribed treatment. The Court found relevant that the available medical information showed that the recommended drugs proved to have positive effects for the applicant and that the authorities, therefore, were or ought to have been aware of the need for these drugs, in the lack of which a real and immediate risk to the applicant's life existed. Since the authorities failed to take timely measures within the scope of their powers that might have been, and indeed were, expected of them, as confirmed by domestic case law, to avoid that risk, the Court could not 'rule out that the State's failure to provide the applicant with appropriate medical treatment [had] contributed to an aggravation of his disease'.[116] Article 2 had therefore been violated.

In *Mehmet Şentürk and Bekir Şentürk v Turkey*,[117] the applicants' wife and mother died while she was 34 weeks' pregnant, after she had been refused medical treatment in different hospitals. The Court relies heavily on the investigation conducted at the domestic level, which established that the woman's death had been due to the errors of judgement made by health professionals and to a failure to provide treatment to the deceased woman on account of her inability to pay the hospital fees in advance, despite the fact that under domestic law, emergency medical treatment is provided without a requirement for advance payment. The Court concludes that the deceased woman was a

---

112 *Pentiacova and 48 others v Moldova* App no 14462/03 (ECHR, 4 January 2005).
113 *Cyprus v Turkey* App no 25781/94 (ECHR, 10 May 2001), para 219.
114 Para 219.
115 *Panaitescu v Romania* App no 30909/06 (ECHR, 10 April 2012).
116 Para 36.
117 *Mehmet Şentürk and Bekir Şentürk v Turkey* App no 13423/09 (ECHR, 9 April 2013).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

victim of a flagrant malfunctioning of the hospital departments and that she was deprived of the possibility of access to appropriate emergency care. This finding is sufficient for the Court to conclude that the state failed in its obligation to protect her physical integrity. Consequently, it concludes that there was a violation of the substantive limb of Article 2 of the Convention.

The case of *Mehmet Şentürk and Bekir Şentürk* is not about the obligation for the state to provide emergency health care free of charge, but about *access* to emergency health care. Access to such care may not be made dependent on payment of hospital fees in advance. The question who has to pay for such care eventually is not answered by the Court in this case.[118] Other cases show that the Court generally does not rule that the state needs to provide health care free of charge, if this is not required under domestic law. In the case of *N v the United Kingdom*, the Court held, for example, in the context of Article 3, that this article does not place an obligation on the Contracting State to provide free and unlimited health care to all aliens without a right to stay within its jurisdiction. According to the Court, a finding to the contrary 'would place too great a burden on the Contracting States'.[119] The Court has also made clear that persons cannot lay claim to public funds in order to be treated with a particular drug, even if it concerns live-saving drugs.[120] According to the Court:

> The allocation of public funds in the area of health care, which is a fervently debated issue in a number of European States, is not a matter on which the Court should take a stand. It is for the competent authorities of the Member States to consider and decide how their limited resources should be allocated … . Those authorities are after all better placed than the Court to evaluate the relevant demands in view of the scarce resources and to take responsibility for the difficult choices which have to be made between worthy needs.[121]

The only exception seems to be the case of *Oyal v Turkey*,[122] in which the Court ordered the Turkish state to provide 'free and full medical cover for the first applicant during his lifetime'. This case concerned the complaint under Article 2 about the supply of HIV-infected blood in a hospital to a prematurely born baby. The damage awards received by the family only covered one year's treatment and medication for the baby. As a result, the family was left in debt and poverty and unable to meet the high cost of continued medical treatment for the baby. The Court considered that the most appropriate remedy in the circumstances would have been to have ordered the defendants to pay for the treatment and medication expenses of the baby during his lifetime. The Court concluded therefore that the redress offered to the applicants was far from satisfactory for the purposes of the positive obligation under Article 2 of the Convention. However, as Vonk also notes, this case is not about positive obligations for the state to provide health care free of charge in general, but about liability for severe

---

[118] See the case comment of Hendriks in [2013] 5 *NTM/NJCM Bulletin* 652–657.

[119] *N v The United Kingdom* App no 26565/05 (ECHR, 27 May 2008), para 44.

[120] *Nitecki v Poland* App no 65653/01 (ECHR, 21 March 2002); *Pentiacova and others v Moldova* App no 14462/03 (ECHR, 4 January 2005); *Wiater v Poland* App no 42290 (ECHR, 15 May 2012).

[121] *Wiater v Poland* App no 42290 (ECHR, 15 May 2012), para 39.

[122] *Oyal v Turkey* App no 4864/05 (ECHR, 23 March 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

medical mistakes.[123] This case does therefore not indicate a general obligation to pay for medical treatment for patients with HIV.

IV.iv Conclusion: Protection against Noncompliance with Domestic Law?

The discussion above shows that the Court does provide some protection against destitution and ill-health, as it imposes a number of positive obligations on states in these fields. However, it seems that states are only found to be responsible under Article 2 and Article 3 for poor living conditions or the lack of adequate health care if they have violated obligations resulting from domestic law. With regard to positive obligations under Article 3 to prevent destitution, the Court seems to require a kind of deliberate or intentional act by the state. The only example of such an act so far is the situation in which the state, despite a (domestic) legal obligation to do so, does not provide for adequate living conditions. With regard to positive obligations to provide health care, the Court has so far found violations of Article 2 only in cases in which medical errors had been made or where provision of medicines has been denied contrary to domestic law and domestic court decisions. Even though this case law leaves open the possibility for state responsibility in other cases of destitution or ill-health, for example with regard to particular vulnerable persons, the case law as it stands seems to limit state responsibility to cases in which domestic law already accepts it.

V. CONCLUSION: MODEST PROTECTION OF SOCIAL SECURITY RIGHTS IN THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

Even though the ECHR is primarily concerned with civil and political rights, a development towards increasing protection of social security interests can be detected in the case law of the European Court of Human Rights. The approach by the Court is cautious. It leaves states a large margin of appreciation in amending social security schemes or withdrawing social security benefits, leaves states room to gradually make adjustments in their social security schemes, to enter into bilateral social security conventions and to withhold social security benefits from illegally present migrants, and holds states responsible for poor living conditions only if this responsibility also exists under domestic law. On the other hand, the Court's case law did indicate that states had to change the personal scope of their social security schemes (e.g. to include non-nationals and non-residents or to delete differences between men and women) or had to provide benefits to vulnerable asylum seekers present on their territory. In addition, the case law leaves room for a more extensive protection of social security interests by the European Court of Human Rights in the future. When examining European legal standards for the design of national social security schemes, case law of the European Court of Human Rights should, therefore, not be overlooked.

---

[123] Case comment in [2010] *EHRC* 68.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

BIBLIOGRAPHY

Dembour, MB (2012), '*Gaygusuz* Revisited: The Limits of the European Court of Human Rights' Equality Agenda' *Human Rights Law Review*, **12** 689–721.

Harris, D et al (2009), *Law of the European Convention on Human Rights*, Oxford: Oxford University Press.

Koch, IE (2009), *Human Rights as Indivisible Rights. The Protection of Socio-Economic Demands under the European Convention on Human Rights*, Leiden/Boston: Martinus Nijhoff Publishers.

Leijten, I (2013), 'Social Security as a Human Rights Issue in Europe – *Ramaer and Van Willigen* and the Development of Property Protection and Non-Discrimination under the ECHR' *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* **73** 177–208.

Noordam, FM and GJ Vonk (2011) *Hoofdzaken socialezekerheidsrecht*, Deventer: Kluwer.

O'Cinneide, C (2008), 'A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights' *European Human Rights Law Review*, 583–605.

Palmer, E (2009), 'Protecting Socio-Economic Rights through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights' *Erasmus Law Review* **2** 397–425.

Pennings, F (2013), 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?' *Utrecht Law Review* **9** 118–134.

Slingenberg, L (2014), *The Reception of Asylum Seekers under International Law. Between Sovereignty and Equality*, Oxford: Hart Publishing.

Van Dijk, F et al (eds) (2006), *Theory and Practice of the European Convention on Human Rights*, Antwerp/Oxford: Intersentia.

Vonk, GJ (2000), 'Social Security and the Right to Property: Gaygusuz and After' in JP Loof, H Ploeger and A van der Steur (eds), *The Right to Property, the Influence of Article I Protocol No. 1 ECHR on Several Fields of Domestic Law*, Maastricht: EM Meijers Institute, 145–155.

White, RCA and C Ovey (2010), *The European Convention on Human Rights*, New York: Oxford University Press.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:45:55PM
via University College London (UCL)

4. Social security in the 'case law' of the Social Rights Committee

George Katrougalos

I. INTRODUCTION

The European Social Charter is, arguably, the most comprehensive and extensive international instrument of protection of social rights, preceding by five years the UN Convention on Economic and Social Rights. It protects explicitly the right to Social Security in Article 12. The importance of the Charter was increased after the 1995 Protocol on Collective Complaints, which established a procedure of collective complaints; the latter constitutes an unprecedented monitoring mechanism for the European Social Charter, providing for hearings from both sides and a decision stipulating whether the Charter has been violated. Even though the monitoring organ of the Charter, the European Committee of Social Rights, is not a formal court, its decisions can be considered as quasi-judicial acts. Recently, in a number of decisions on collective complaints of trade unions related to restrictions due to the economic crisis in countries of Southern Europe, the Committee has declared a violation of Article 12, reaffirming its stance that

> the economic crisis should not have as a consequence the reduction of the protection of the rights recognized by the Charter. Hence, governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries most need the protection.

II. THE EUROPEAN SOCIAL CHARTER AND ITS MONITORING

The Europeanisation of European social security law is a slow and complex procedure which is mostly driven by the case law of the European Court of Justice and European Court of Human Rights. However, the importance of the European Social Charter and its organ of supervision should not be underestimated. Although the Council of Europe is not an institution specialising in social issues, according to the preamble of its statute, it aims at social-economic progress and has several treaties related to social security in its credit, most of them concluded with the technical assistance of the International Labour Organization (ILO). Aside from the European Social Charter, the most significant among them are the European Convention on Social and Medical Assistance (1949), the European Code of Social Security with its additional Addendum (1964) and the European Convention on Social Security (1977), which improves the minimum standards of protection set by ILO Convention No 102.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

Still, the most important instrument of the Council of Europe – and the first general international convention on social rights, preceding by five years the International Covenant on Economic and Social Rights of the UN[1] – is the European Social Charter (1961, revised 1996) and its additional protocols.[2] It opened for signature on 18 October 1961 and entered into force on 26 February 1965. By the end of 2013, 43 states of the 47 member states of the Council of Europe had ratified it. (More specifically, 30 countries have ratified the Revised Charter and 13 countries are still bound by the 1961 Charter. The states which have ratified neither of them are Liechtenstein, Monaco, San Marino and Switzerland.) The countries that have ratified the Charter undertake the obligation to report periodically on the application of its provisions and upon ratifying Article D to participate in the collective complaints procedure, which is a quasi-judicial process allowing organisation of civil society to bring allegations of violation before the European Committee of Social Rights.

A condition of ratification is that a state commits to 16 articles out of 31, or to 63 numbered paragraphs out of a total of 98, including six out of the nine so-called hard-core articles, which comprise Article 12 on the right to social security (the others are: Article 1 on employment, Article 5 on the right to organise, Article 6 on the right to negotiate, Article 7 on the protection of children and young persons, Article 13 on the right to social assistance and medical aid, Article 16 on the protection of family, Article 19 on the rights of migrant workers, Article 20 on the equal opportunities of men and women at work). Only France and Portugal have ratified every single provision of the Revised Charter. Germany and the United Kingdom have not yet ratified the Revised Charter and have not yet even signed the collective complaints protocol.

The system of supervision of the Charter does not provide for immediate sanctions in case of violation. States have been reluctant to recognise full judicial status to the Committee or assimilate its supervision to the European Court of Human Rights. The Parliamentary Assembly of the Council of Europe has proposed in its Recommendations 1354 (1998) and 1415 (1999) to incorporate fundamental social rights in a protocol to the European Convention on Human Rights (ECHR) or to establish a European Court of Social Rights. However, the Committee of Ministers opposed both proposals.

---

[1] For a comparison of the two instruments, see JF Akandji-Kombe, 'The European Social Charter and the UN Covenant on Economic, Social and Cultural Rights' in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux* (Bruylant 2008).

[2] For an overview of the Charter see M Mikkola, *Social Human Rights of Europe* (Legisactio 2010); M Swiatkowski, *Charter of Social Rights of the Council of Europe* (Kluwer Law International 2007); R Brillat, 'The European Social Charter and Monitoring its Implementation', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux* (Bruylant 2008); JF Akandji-Kombe and S Leclerc (eds), *La Charte sociale européenne* (Bruylant 2001); DJ Harris and J Darcy, *The European Social Charter* (Transnational Publishers 2001); O De Schutter and M Sant'Ana, 'The European Committee of Social Rights', in Gauthier de Beco (ed), *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge 2012).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

The Charter stipulates, instead, the obligation of the states to submit reports to the European Committee of Social Rights (Committee on Social Rights, initially Committee of Independent Experts), a supervisory organ composed of 15 experts elected by the Committee of Ministers for six years and assisted by an observer from the ILO. Another body of supervision with overlapping competence is the Governmental Committee. It is composed of representatives of the governments of all member states and has to present a report to the Committee of Ministers.

The Committee examines the reports submitted by the states parties to the Charter and makes a legal assessment of states' observance of their obligations. The Governmental Committee prepares the decisions of the Committee of Ministers and in particular selects, on the basis of social, economic and other policy considerations, those situations which should be the subject of individual recommendations addressed to the Contracting Parties concerned. Finally, the Committee of Ministers, the supreme organ of the Charter, adopts a resolution for the supervision cycle as a whole and issues recommendations to states, inviting them to change their legislation or practice. The Parliamentary Assembly is also loosely associated with the supervisory mechanism. As of 1992 it no longer participates directly, but may organise periodic social policy debates arising from the Conclusions of the European Committee of Social Rights.

The Committee of Ministers exercises its competence with extreme caution and reserve. During the first decades practically no recommendation has been issued.[3] A reason for this eclipse is the fact that, initially, decisions were to be made by a two-thirds majority of the total of the members of the Council of Europe. This majority was practically impossible to attain, because at this time hardly two-thirds of the Council of Europe had ratified the Charter. Therefore, the procedure has been modified and now the required majority is two-thirds of the *present* state-members. Still, even after the reform, between 2002 and 2010, the Committee issued only three recommendations.

Still, the Charter had a new 'revitalisation' period after the 1990s, as part of a reform of its monitoring procedures.[4] Initially the states had to present reports on the application of the revised European Social Charter every two years (30 June of odd years) on the 'hard core' provisions, which include Article 12 on social security,[5] and every four years (31 March of even years, alternatively report on half the provisions concerned) on the other provisions. Currently states have to present a report annually on a part of the provisions of the Charter, the provisions having been divided into the

[3] See K Fuchs, 'The European Social Charter: Its Role in Present-Day Europe and Its Reform', in Krzysztof Drzewicki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights: A European Challenge* (Åbo Akademi 1994), 151.

[4] O De Schutter and M Sant'Ana, 'The European Committee of Social Rights', in Gauthier de Beco (ed), *Human Rights Monitoring Mechanisms of the Council of Europe* (Routledge 2012) 72 ff; A Hendriks, 'Revised European Social Charter' (1996) 14(3) *Netherlands Quarterly of Human Rights* 341–342; JF Akandji-Kombe, 'La procédure des réclamations collectives dans la Charte sociale européenne' [2001] *RTDH*, 1035 ff.

[5] The other articles are 1, 5, 6, 7, 13, 16, 19 and 20.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

following thematic groups: employment, social protection, labour rights, family protection and immigrants. In this way, each provision of the Charter will be reported on once every four years.[6]

The most innovative mechanism, although falling short of ascertaining a full jurisdictional organ, is the establishment by a Protocol of 1995 of a procedure of collective complaints, which enables trade unions, employers' organisations and accredited NGOs to refer violations of the Charter.[7] The complaints are not related to individual cases, but aim to redress situations harmful of social rights, through an assessment of legislation, rules or general practices, rather than the concrete way in which those rules are applied to a specific case.[8] Due to this particular character of the remedy, a complaint is, by derogation of the international standards, admissible even without prior exhaustion of all domestic remedies.[9]

The mechanism of collective complaints constitutes undeniable progress in the monitoring of social and economic rights. The European Committee of Social Rights is inspired in its examination by the procedures used by the European Court of Human Rights, so as to relatively make up for its non-jurisdictional status. It is true that the control mechanism of the Charter has not led, up till now, to a protection of social and economic rights equivalent to the ECHR. Still, the European Committee of Human Rights has 'case law' to be taken seriously. Although not a court, the Committee of Social Rights is a quasi-judicial body which interprets the Charter in a way that is binding on the states parties.

The European Committee of Social Rights, unlike the UN Committee on the Convention on Economic and Social Rights, does not supervise the Charter through 'General Comments', separate from the monitoring procedure and aiming to define, in abstract, the content and the scope of a right. Its 'case law' is developed, instead, on the basis of the examination of the state reports and the evaluation of collective complaints. Based on them, it summarises its basic jurisprudence in its Conclusions, where it provides, in their introductory part, general interpretations of the Charter's provisions.

The Committee does not examine the national protection of social rights *in abstracto*, but evaluates also its factual implementation, therefore often having recourse to technical reports and statistical data.[10] Hence, the starting point is the assessment, from a legal standpoint, of the compliance of national law and practice with the Charter (Article 24, § 2 revised ESC). Further,

---

[6] See the Rules of Procedure adopted by the Committee at its 117th meeting, Strasbourg, 13 to 16 May 2008.

[7] See D Harris, 'The Collective Complaints Procedure', in Council of Europe, *The Social Charter of the 21st Century* (Council of Europe Publishing 1997) 100; JF Akandji-Kombe, 'L'application de la Charte sociale européenne; la mise en œuvre de la procédure des réclamations collectives' [2000] *Droit social* 888.

[8] *SAIGI – Syndicat des Hauts Fonctionnaires v France* Complaint 29/2005 (ECSR, 14 June 2005).

[9] *European Roma Rights Centre v Bulgaria* Complaint 31/2005 (ECSR, 10 October 2005).

[10] Cf. *ICJ v Portugal* Complaint 1/1998 (ECSR, 10 September 1999); *Syndicat national des professions du tourisme v France* Complaint 6/1999 (ECSR, 10 October 2000).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

> the Committee … considers, as the European Court of Human Rights has done with respect to the European Convention on Human Rights, that a teleological approach should be adopted when interpreting the Revised Charter, i.e. it is necessary to seek the interpretation of the treaty that is most appropriate, in order to realize the aim and achieve the object of the treaty, not that which would restrict to the greatest possible degree the obligations undertaken by the parties.[11]

After all, the Charter is a 'human rights protection instrument' whose 'aim and purpose … is to protect rights, not merely theoretically but also in reality'.[12]

III. THE RIGHT TO SOCIAL SECURITY UNDER THE CHARTER

III.i Content of the Right

Article 12(1) is the basic European social security provision on the right to social security. It reads as follows:

> With a view to ensuring the effective exercise of the right to social security, the Parties undertake:
>
> 1. to establish or maintain a system of social security;
> 2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
> 3. to endeavour to raise progressively the system of social security to a higher level;
> 4. to take steps, by the conclusion of appropriate bilateral and multilateral agreements or by other means, and subject to the conditions laid down in such agreements, in order to ensure:
>   (a) equal treatment with their own nationals of the nationals of other Parties in respect of social security rights, including the retention of benefits arising out of social security legislation, whatever movements the persons protected may undertake between the territories of the Parties.
>   (b) the granting, maintenance and resumption of social security rights by such means as the accumulation of insurance or employment periods completed under the legislation of each of the Parties.

The article covers all aspects of social security, universal, occupational schemes, contributory, non-contributory and general schemes us well as special schemes. The first paragraph provides the material scope of the social security system, which should cover all traditional risks (health care, sickness, unemployment, old age, employment injury, family, maternity, invalidity and survivors' branches). The second paragraph obliges the states to maintain a social security system at a satisfactory level at least

---

[11] JF Akandji-Kombe, 'The European Social Charter and the UN Covenant on Economic, Social and Cultural Rights', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux* (Bruylant 2008); cf. *ERRC v Greece* (ECSR, 8 December 2004); *CEDR v Bulgaria* (ECSR, 18 October 2006; *CEDR v Italy* (ECSR, 7 December 2005); *CEDR v Bulgaria*, (ECSR, 18 October 2006).

[12] *International Commission of Jurists v Portugal* Complaint 1/1998 (ECSR, 10 September 1999).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

equal to that necessary for the ratification of ILO Convention No 102, as a starting point for the content of social security or its standards.

In the light of this paragraph, when reforms restrict the scope or benefits of a social security system, they must be justified with respect also to their sustainability. In any case, states must always maintain a basic compulsory and sufficiently extensive social security system. The third paragraph requires states to ensure the progressive development of their social security systems. Finally, the fourth paragraph sets out the coordination rules of securing the social protection of movement of persons from one country to another, ensuring equal treatment of nationals who are lawfully resident or working regularly on the territory of a state party.

III.i.a An adequate social security system

According to the case law of the Committee each country is free to define its own social security system.[13] The European Social Charter intends neither to impose a common model, nor to harmonise social security legislation, but rather to lay down common minimum standards and more importantly (a) the adequacy of social security and (b) its inclusiveness, in the sense of universal coverage.

An 'adequate system' is one:

(a) which covers the nine traditional contingencies, at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;
(b) is collectively funded and the state secures the viability of its funding;
(c) whose conditions of entitlement are reasonable;
(d) where loss of income is compensated in a timely manner;
(e) where the minimum level of benefits is higher than the poverty threshold;
(f) whose scope of persons includes the majority of workers and, as regards universal benefits, the whole population;
(g) where there is a possibility of an appeal for review of decisions concerning the allocation of social security benefits by an independent body and, ultimately, for decision by a fair trial.[14]

Regarding the level of benefits, the objective of social security is to maintain the living standard reached by previous employment. According to paragraph 2 of Article 12, which makes reference to the European Code of Social Security (1964), the minimum level of social insurance benefits should not fall either (a) under 40–50 per cent of previous income,[15] depending on the type of benefit, or (b) below the subsistence level (the poverty threshold). The latter is defined according to the Eurostat concept of 'at

[13] Cf. N Valticos, 'The European Social Charter and International Labour Standards' (1961) 89(5–6) *International Labour Review*.

[14] M Mikkola, *Social Human Rights of Europe* (Legisactio 2010).

[15] Bulgarian unemployment benefit, minimum pension and disability pension; Lithuanian unemployment benefit and old age pension, Romanian agricultural workers' pension and Estonian unemployment support were considered to be manifestly inadequate as their levels were below 40% of the aforementioned equivalised net median income.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

risk of poverty',[16] so that any income-substituting benefit paid should in principle amount to at least 50 per cent of the country's net median equivalised household income per adult.[17] The Committee holds that countries may be in compliance with this standard if the 50 per cent threshold is in individual cases reached by a combination of social security benefit and supplementary benefits of social assistance.

It further maintains that any decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals may have in respect of the stability of the rules applicable to social security benefits. The Committee holds that any restrictive measures should not deprive pensioners of the essential means of subsistence.[18]

With regard to the personal scope of social security the Committee maintains that the great majority of workers should be covered and, more specifically, health and maternity benefits in kind (services), child allowances and basic pension or minimum type of income for all the elderly should cover the whole population.[19] Moreover, it specified the scope of the state's positive obligation in relation to more vulnerable groups, considering that, due to their different situation, appropriate and targeted measures should be taken to efficiently protect them.[20]

III.i.b Progressive development of the social security system

Based on the obligation set forth by Article 12(3), the European Committee of Social Rights requires the states to ensure the progressive development of their social security systems either by extending their personal scope and cover of new risks or by increasing benefits, to an extent consistent with the maximum use of available resources.[21] Before 2004, the Committee had reached a conclusion of non-conformity under Article 12(3) in only two cases: health reform of the Netherlands and the Norwegian reform of unemployment benefits.

More illustrative are the Conclusions of the Committee of Social Rights on the first reform, which has partially shifted the funding of some benefits to employers, abandoning the collective funding principle.[22] In its framework,[23] employers had to continue to pay out the employee's wages in the event of illness up to two years (70 per cent of wages with a maximum of €167 per day). There was no entitlement to public

---

[16] *Conclusions 2007*, *Belgium*, Article 30.

[17] *Conclusions XVII-4, Netherlands*, *Conclusions XVII-1*.

[18] Paras 75–76 of the Collective Complaint 68/2011; cf. also paras 36 and 47 of *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* Collective Complaint 80/2012.

[19] *Conclusions XVI-1*, l0–ll, *Conclusion XVI-I, Introduction* and *XVII-1I* country-by-country conclusions. Cf. M Mikkola, *Social Human Rights of Europe* (Legisactio 2010) 315.

[20] Cf. *ERRC v Italy* Complaint 27/2004, decision on the merits of 7 December 2005, §21: 'equal treatment implies that Italy should take measures appropriate to Romas' particular circumstances to safeguard their rights'.

[21] See *Conclusions XVI-1, Statement of Interpretation on Article 12*, p II; Conclusions *XIV-1, Finland* 22, *Conclusions 2011, Italy* 448.

[22] *Conclusions XVI-1, Netherlands* 449.

[23] WULBZ Act of 1996, finalised by the Work and Income According to Work Capacity Act (WIA) of 2006. According to the ILO Committee of Experts it 'has no comparison in the history of social security in Europe'. CEACR, *Individual Observation concerning Convention No. 102, Social Security (Minimum Standards) Netherlands* (ILO 2003).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

disablement benefit until this two-year period had elapsed. Practically, the public scheme of the Sickness Benefits Act continued to exist only as a safety net of last resort.

The Committee found these measures not in conformity with Article 12(1) and Article 12(3) of the European Social Charter as (a) they undermined the collective nature of benefits, running counter in the principle of progressive development of social security and (b) in this manner the right to sickness and invalidity benefits was not effectively secured as a social security right.[24] The subsequent Committee of Ministers Resolution referred especially to negative effects regarding adverse selection for recruitment of workers with a history of medical problems, resulting in exclusion for those with a higher-than-average risk of becoming ill or occupationally disabled.[25]

Along this line, in subsequent Conclusions the Committee of Social Rights has reaffirmed that the collective nature of the funding of compulsory social security, through contributions and/or taxation, is a key element of the right, as it allows the risk to be apportioned between the different members of the group.[26] The Committee of Social Rights has reached, under Article 8 of the Charter, similar conclusions as regards the Dutch reform of maternity benefits.[27]

In the following years the Committee of Social Rights has developed an even more detailed typology in its assessment of the conformity of a restriction with Article 12(3). In this framework it requests from the states analytical information on the following criteria:[28]

---

[24] The factual evidence of the implementation of the reforms seem to vindicate these conclusions, as the new Dutch health insurance model seems unable to control costs, public satisfaction is not high, and perceived quality is down. Despite re-insurance, several employers were not able to bear the actual risks and consequently faced bankruptcy. See M Plantinga and A Tollenaar, *Public Governance in the Dutch Welfare State, The Consequences of Privatisation for Securing Public Interests in the History of the Dutch Welfare State, Paper for the panel 'Regulating Private Welfare Provision'* (4th ECPR conference, 6–8 September 2007); G Katrougalos, 'Constitutional Limitations of Social Security Privatisation' (2010) 12(1) *European Journal of Social Security* 16; P Vaillancourt-Rosenau and Ch J Lako, 'An Experiment with Regulated Competition and Individual Mandates for Universal Health Care: The New Dutch Health Insurance System' (2008) 33(6) *Journal of Health Politics, Policy and Law* 1031–1055.

[25] Plantinga and Tollenaar (2007).

[26] Addendum to *Conclusions XV-1 97, Conclusions XVIII-1* (Netherlands – Kingdom in Europe, Aruba, Netherlands Antilles. In its *Conclusions XVII-1* 321, it stressed that 'The principle of collective funding is a fundamental feature of a social security system as foreseen by Article 12 of the Charter as it ensures that the burden of risks are spread among the members of the community, including employers, in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers'. Cf. also *Conclusions XIV-1, Statement of Interpretation of Article 12* 48.

[27] *Conclusions XVII-2, Netherlands*, Article 8, 590. The abolishment of the Disablement Benefits (Self-Employed Persons) Act in 2004 entailed the withdrawal of maternity benefits for self-employed women, for whom the only alternative is private insurance. Moreover, self-employed workers were no longer covered for disablement benefits.

[28] *Conclusions XVI-1, Statement of Interpretation of Article 12, 11*; see also (2008) 12 *Digest* and Mikkola (2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

(a) the nature of the changes (field of application, conditions of granting);
(b) the reasons given for the changes and the framework of social and economic policy in which they arise;
(c) the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
(d) the necessity of the reform, and its adequacy in the situation which gave rise to these changes (the aims pursued);
(e) the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes;
(f) the results obtained by such changes.

Following these criteria, the Committee has recently (2013) held pensions cut-backs, based on austerity measures, as incompatible with the Charter (see below, III.ii).

III.i.c Equal treatment of migrant workers

According to Article 12(4a) ESC, the parties undertake to guarantee, in principle, equal treatment with their own nationals or the nationals of other parties, in respect of social security rights, including the retention of benefits arising out of social security legislation. The Appendix to the Charter specifies, however, that states may require the completion of a prescribed period of residence before granting such benefits to immigrants.

Since 2006, the Committee has interpreted this clause in the sense that the following principles must be guaranteed with respect to 'mobile' citizens of other states parties: equal treatment, maintenance of accruing rights and retention of accrued rights. Equal treatment includes prohibition of direct (nationality requirement) and indirect (residence condition and length of residence requirement, employment requirements) discrimination for contributory benefits and non-excessive residence and length-of-residence requirement for non-contributory benefits, such as family benefits. Any length of residence imposed must be proportional to the objective pursued and not excessive.[29]

The right to maintenance of acquired rights comprises invalidity, old age, survivors, employment injury or disease. Invalidity benefit, old-age benefit, survivor's benefit and occupational accident or disease benefit acquired under the legislation of one state according to the eligibility criteria laid down under national legislation are maintained, whatever the movements of the beneficiary. However, due to the particular nature of the unemployment benefit, which is a short-term allowance closely linked to trends in the labour market, its exportability is not a requirement under Article 12(4)(a). The respective obligations must be fulfilled through bilateral agreements or any other means such as unilateral, legislative or administrative measures. The right to retention of accruing rights through aggregation of employment or insurance periods completed abroad must be fulfilled in similar ways, irrespective of any other multilateral social security agreement that might be applicable.[30]

---

[29] *Conclusions XIII-4 Statement of Interpretation of Article 12*, 43, *Conclusions 2004, Estonia*, 171, and *Lithuania*, 370.

[30] *Conclusions XI11-4, Statement of Interpretation of Article 12*, 45.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

III.ii The Scope of Right *Ratione Personae*

The Appendix to the Charter regarding the scope of protection of, *inter alia*, the right of foreigners to social security reads as follows: 'Articles 1 to 17 and 20 to 31 apply to foreigners only in so far as they are nationals of other Parties lawfully resident or working regularly within the territory of the Party concerned', 'without prejudice to Article 12, paragraph 4, and Article 13, paragraph 4'. Hence, the textual interpretation of the Charter seems to imply that the right is guaranteed on an equal footing to those and only to those foreigners who are nationals of a contracting state and are either legally resident or regularly employed in the host state.[31] However, Mikkola, former Chairman of the Committee of Social Rights, proposed a persuasive teleological interpretation that expands the scope of protection.[32] His interpretation is based on the necessity to implement the Charter in relation also to the case law of the ECtHR and the Convention, since the two key legal human rights instruments are indivisible, interdependent and overlapping on issues of a fundamental nature.

He claims that the restriction on the scope of persons in the Appendix should be interpreted in a restrictive way taking into account the hierarchy of human rights provisions, in particular in relation to the ECHR. In this sense, the guiding principles of dignity and protection against all type of abuse of people must be understood similarly in the application of the Charter and the Convention, as basic standards covering also non-nationals.

The Committee does not fully adopt but nor does it preclude this interpretation, holding 'that the implementation of certain provisions of the Charter could in certain specific situations require complete equality of treatment between nationals and foreigners, whether or not they are nationals of member states party to the Charter'.[33] Further, in several decisions, it insisted on the complementary nature of the two instruments, reminding that 'the rights guaranteed by the Charter are not an end in themselves; rather they complete the rights enshrined in the Convention'.[34] In this sense, the Charter should be considered as a 'counterpart' to the ECHR, since both instruments were conceived to serve the same purpose, namely the effective protection of human rights, and both are based on common values promoted by the Council of Europe.[35]

---

[31] For the protection of citizens of third, non-European countries, immigrants and stateless persons, the provisions of the European Convention on the Legal Status of Migrant Workers (1977) are crucial, as well as the European Convention on Social Security, which ensures that the protection of the aforementioned categories is equal to the protection enjoyed by the citizens of the contracting states.

[32] Mikkola (2010) 72 ff.

[33] (2006) 12 *Digest* 168.

[34] *FIDH v France* Complaint 14/2003 (ECSR, 8 September 2004) §27.

[35] See *FIDH v France* Complaint 14/2003 (ECSR, 8 September 2004) §27. The European Committee on Social Rights quotes as the basis of its interpretation that 'the Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights that it is a living instrument dedicated to certain values which inspired it: dignity, autonomy, equality and solidarity'.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

The most indicative decision of this trend is a 2003 collective complaint *FIDH v France*, related to the right to health of an illegal migrant family with children, who had been denied medical treatment.[36] The decision asserted a right to health for the children, but not for the parents (except for life-threatening situations)[37] on an ethical rather than legal argument, according to which 'Children following their parents but without the required permits could not be blamed and considered as illegal immigrants'.[38] Hence, their right to adequate health care services was grounded on Article 17 in conjunction with Article 17 of the Charter, which does not allow any requirements on the length of residence.

Along the same line, the Committee of Social Rights decided, in the case of *Autisme Europe v France*[39] not to apply the distinction of the Appendix between nationals and non-nationals of member states, when it is incompatible with the due respect to life and to human dignity.

III.iii Limitations of the Right in Times of Crisis

The Charter contains two separate provisions on limitations and/or restrictions of its rights, in Articles F and G, which read as follows:

> Article F – Derogations in time of war or public emergency
>
> 1. In time of war or other public emergency threatening the life of the nation any Party may take measures derogating from its obligations under this Charter to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.
> 2. Any Party which has availed itself of this right of derogation shall, within a reasonable lapse of time, keep the Secretary General of the Council of Europe fully informed of the measures taken and of the reasons therefor. It shall likewise inform the Secretary General when such measures have ceased to operate and the provisions of the Charter which it has accepted are again being fully executed.
>
> Article G – Restrictions
>
> 1. The rights and principles set forth in Part I when effectively realised, and their effective exercise as provided for in Part II, shall not be subject to any restrictions or limitations not specified in those parts, except such as are prescribed by law and are necessary in a democratic society for the protection of the rights and freedoms of others or for the protection of public interest, national security, public health, or morals.
> 2. The restrictions permitted under this Charter to the rights and obligations set forth herein shall not be applied for any purpose other than that for which they have been prescribed.

The provision of Article F covers temporary decreases in benefits in a situation of derogations, in time of war or public emergency, as temporary measures of fast resort when the state's possibilities of fulfilling its obligations are considerably diminished. So far, no state party has had recourse to Article F.

---

[36] *FIDH v France* Complaint 14/2003 (ECSR, 8 September 2004) §§ 17–19.
[37] Ibid §§ 33–34.
[38] Ibid §§ 35–37.
[39] *Autisme Europe v France* Collective Complaint 13/2002 (ECSR, 4 November 2003).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

With regard to Article G, exactly as with regard to the ECHR, limitation of protection is possible only in cases of collision with other rights, or an important public interest, but only satisfying the following conditions:

(a) The restrictions should be imposed by a law that it is sufficiently clear, precise and predictable.
(b) The restriction has to serve a legitimate purpose of public interest, national security, public health or morals.
(c) The restriction also needs to be necessary in a democratic society for the pursuance of these purposes, i.e. that a restriction is a justifiable response to a 'pressing social need', bearing in mind that a restriction is permitted under Article G only in 'exceptional cases'.[40]

However, the most important limitation of social rights occurs in periods of economic crisis or retrenchment. Since the 1990s the Committee of Social Rights has on numerous occasions considered that cut-backs of social budgets were not at the absolute discretion of the legislator. In *Conclusions IX-2*, the Committee expressed the view 'that it has to differentiate measures aimed at dismantling social security schemes from arrangements designed solely to help to preserve a social security system that meets the Social Charter requirements, so that the system may resume its progress as soon as economic conditions permit'.

The Committee insists further on the following conditions so that the limitations conform with the Charter:[41]

(a) The restrictions must not encroach on fundamental social human rights.
(b) The goal of the reform should be to ensure the viability of the social protection system. Hence, short-term economic losses do not justify restrictions of the Charter's Rights.
(c) Benefits may never fall below the minimum income level (poverty threshold).
(d) The measures taken should not be discriminatory to any group of people and especially the more vulnerable ones.
(e) Proportionality of means and aims (i.e. whether the measures are appropriate and reasonable).

These principles do not absolutely preclude lowering of some benefits, when 'consolidating public finances, in order to prevent deficits and debt interest from increasing, is one way of safeguarding the social security system'.[42] The Committee has, for instance, evaluated restrictions introduced on pension rights in a situation where 'the trend towards restrictions in the system of social security was mainly due to the measures taken to reduce social welfare expenditure which have risen [and] the purpose of these

[40] Mikkola (2010) 79.
[41] *Conclusions XIII-4, XVI-1, XVI-2 Introduction, Conclusions*, *Ireland*, 2009; *Conclusions*, *Finland*, 2009.
[42] *Conclusions XIV-1, Statement of Interpretation of Article 12*, p. 47, cf. Mikkola (2010) 321.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

measures was to help reduce the national debt and to improve the country's economic foundations'. Further, it has upheld the 'introduction of several of the measures was prompted by the need to take account of current social developments such as the ageing of population which made it necessary to review the methods for covering the costs of pensions', as 'care had been taken to ensure that the burden of these reforms did not weigh too heavily on the economically most vulnerable households'.[43]

However, the reforms should not undermine the effective compulsory social security system, which should remain sufficiently extensive against social and economic risks and not degrade into a rudimentary social assistance system. Moreover, the Committee of Social Rights considers that the economic crisis accentuates rather than alleviates the respective obligations of the states. It notes that by acceding to the 1961 Charter, the states parties 'have accepted to pursue by all appropriate means the attainment of conditions in which, inter alia, the right to health, the right to social security, the right to social and medical assistance and the right to benefit from social welfare services may be effectively realised'. Accordingly, 'the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.'[44]

These principles have been reaffirmed recently, with regard to the implementation of austerity measures associated to 'Memoranda' between lenders and indebted European countries.[45] In a number of decisions issued upon collective complaints the Committee of Social Rights has initially made clear that other international agreements, such as included in the Memoranda and the related international loan treaties, do not absolve the states from their obligations to respect Article 12 nor remove them from the ambit of the Charter. This has already been concluded previously in relation to national provisions enacted by states parties to the Charter which were intended to implement European Union directives or other legal norms emanating from the European Union.[46]

Along the same line the Committee held in 2013 that despite the later international obligations of Greece associated with the Loan Treaties and 'Memoranda', there is nothing to absolve the state party from fulfilling its obligations under the 1961 Charter, and that the Committee is competent to examine whether the claims made in the complaint establish that the measures taken by Greece with regard to old-age benefits are not in conformity with Article 12 of the 1961 Charter. The Committee has readopted the aforementioned analysis and precised that

> doing away with such guarantees would not only force employees to shoulder an excessively large share of the consequences of the crisis but also accept pro-cyclical effects liable to make

---

[43] *Conclusions XIV-1, Finland*, 2009.

[44] *General introduction to Conclusions XIX-2*, 2009.

[45] The austerity measures have also been evaluated by the ILO, with regard to the implementation of the International Labour Convention No 102. See *Observation CEACR* [2012] 101st ILC session.

[46] *Confédération générale du travail (CGT) v France* Complaint 55/2009 (ECSR, 23 June 2010) §32; *Confédération Française de l'Encadrement (CFE-CGC) v France* Complaint 16/2003 (ECSR, 12 October 2004) §30.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

> the crisis worse and to increase the burden on welfare systems, particularly social assistance, unless it was decided at the same time to stop fulfilling the obligations of the Charter in the area of social protection.[47]

In a series of collective complaints against Greece[48] with regard to the level of pension benefits under the Charter, the Committee referred to Article 12(3) in conjunction with Article 4(1)(a) of the 1988 Additional Protocol, which also appears with identical wording in Article 23(1)(a) of the 1996 Revised Charter, providing for the right of the elderly to adequate resources in order to enable them to lead a decent life. Basing its evaluation on the entirety of the above criteria, the Committee considered that the reductions that have been introduced by the government individually taken may be considered legitimate. In contrast, the Committee considered that the *cumulative effect* of these restrictions brought about a significant degradation of the standard of living of the pensioners concerned.

Under this light the ECSR concluded:

> Even taking into account the particular context in Greece created by the economic crisis and the fact that the Government was required to take urgent decisions, the Committee furthermore considers that the Government has not conducted the minimum level of research and analysis into the effects of such far-reaching measures that is necessary to assess in a meaningful manner their full impact on vulnerable groups in society. Neither has it discussed the available studies with the organisations concerned, despite the fact that they represent the interests of many of the groups most affected by the measures at issue. … In general, the Committee thus concludes that the Government has not established, as is required by Article 12§3, that efforts have been made to maintain a sufficient level of protection for the benefit of the most vulnerable members of society, even though the effects of the adopted measures risk bringing about a large scale pauperisation of a significant segment of the population, as has been observed by various international organizations.[49]

---

[47] *General Federation of employees of the national electric power corporation (GENOP-DEI) and Confederation of Greek Civil Servants' Trade Unions (ADEDY) v Greece* Complaint 65/2011 (ECSR, 23 May 2012) § 18, cf. also Complaints 78-80/2012.

[48] Ibid.

[49] Paragraphs 75–76, cf. also paragraphs 36 and 47 of *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* Collective Complaint 80/2012. The Committee held, consequently, that due to the cumulative effect of the restrictive measures and the procedures adopted to put them into place, contained in Laws No 3845 of 6 May 2010, Act No 3847 of 11 May 2010, Act No 3863 of 15 July 2010, Act No 3865 of 21 July 2010, Act No 3896 of 1 July 2011, Act No 4024 of 27 October 2011, Act No 3833 of 15 March 2010, Act No 3866 of 26 May 2010, Act No 3986 of 1 July 2011, Act No 4002 of 22 August 2011, Act No 4051 of 28 February 2012 and Act No 4093/2012 of 12 November 2012, this statutory legislation constitutes a violation of Article 12(3) of the 1961 Charter.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

IV. INTERACTION WITH THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND THE NATIONAL COURTS

IV.i Social Charter and the European Convention on Human Rights

The Committee of Social Rights insists on the complementary character and the interdependence of the Charter and the ECHR, trying to give substance to a uniform system of protection of human rights combining, on an equal footing, civil and political rights with economic and social rights. Besides its doctrinal virtue, this is clearly a strategy to strengthen the authority of its rulings and an effort to render them less questionable by states.[50] For example, in the complaint 15/2003 *ECHR v Greece* it based its judgment on the decision in *Connors v United Kingdom*[51] in order to widen the scope of Article 16 of the Social Charter concerning the family's right to social, legal and financial protection[52] as well as to draw 'within reasonable limits' a series of obligations specifically intended to facilitate the exercise for Romas of their right to housing.

On many occasions it reaffirmed its intention to interpret the Charter as 'a living instrument attached to certain values which inspire it: dignity, autonomy, legality and solidarity', whose 'aim is to protect effective and not theoretical rights'.[53] Its objective is to give full effectiveness to the Charter's provisions in order to ensure real

---

[50] See on that, for instance, *CFE/CGC v France* Complaint 16/2003, where the Committee concludes that 'its decisions constitute legally enforceable interpretations of the Charter'. Cf. T Chatton Gregor, 'L'harmonisation des pratiques jurisprudentielles de la Cour européenne des Droits de l'Homme et du Comité européen des Droits sociaux: une évolution discrète', in C Chappuis, B Bénédict Foëx and T Kadner Graziano (eds), *L'harmonisation internationale du droit* (Edition Schulthess 2008) 45.

[51] *Connors v United Kingdom* App 66746/01 (ECHR, 27 May 2004) § 84; *ERRC v Greece* Complaint 15/2003 (ECSR, 8 December 2004) § 20. In the decision on the merits, the Court refers to two of its decisions namely *Buckley v United Kingdom* App 20348/92 (ECHR, 25 September 1996) and *Chapman v United Kingdom* App 27238/95 (ECHR, 18 January 2001) and admits that Article 8 of the Convention imposes on States the positive obligation to facilitate the Roma way of living. In its decision in *Connors v United Kingdom*, it considered that Article 8 of the Convention was violated due to the non-compliance with the requisite procedural guarantees enabling a semi-sedentary Roma to defend himself against the forced eviction from his permanent camp site.

[52] Article 16 of the Social Charter guarantees the right of the family to social, legal and economic protection: 'With a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means'.

[53] *International Commission of Jurists against Portugal* Complaint 1/98 (ECSR, 9 September 1999) § 32; *Autism Europe* Complaint 13/2002 (ECSR, 4 November 2003) §52; cf. JM Laralde, 'Charte sociale européenne et Convention européenne des droits de l'Homme', in J-F Akandji-Kombe and S Leclerc (eds), *La Charte sociale européenne* (Collection Rencontres européennes 2001) 136 ff.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

effectiveness to the guaranteed rights[54] and to gradually widen the standards of protection in the field of human rights.

At present, the interaction between the two texts and their control mechanisms is more and more frequent, through an increasing amount of cross-referencing.[55] The Court refers also to the Charter in order to define the respective scopes of the two conventions. However, it does not seem to consider itself to be bound by the Committee's case law, in most of the cases treating the Charter as an inspirational source or 'soft law'.[56]

IV.ii The Influence of the Charter on National Jurisdictions

The responsibility for implementing the European Social Charter rests with national authorities, primarily the legislator, although a matter could be delegated to social partners or local authorities under the specific constitutional arrangements of each country. However, compliance is obligatory for the member states, since the Charter is a binding legal instrument. Non-implementation arrangements signify non-compliance under the Charter.[57]

The Committee maintains that when states parties agree on binding measures, which relate to matters within the remit of the Charter, they should – both when preparing the text in question and when implementing it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter. It is ultimately for the Committee to assess compliance of a national situation with the Charter, including when the implementation of the parallel international obligations into domestic law may interfere with the proper implementation of those emanating from the Charter.[58]

The ECSR conclusions had a considerable influence on the social policy of the member states, which often resulted in a revision of existing legislation. This was especially true in the first 20 years of implementation of the Charter. For instance, several countries have had to change their laws on family allowances in order to adapt them to the standards of Articles 12 and 8(1).[59] It is noteworthy that even countries

---

[54] See for example, *International Commission of Jurists v Portugal* Complaint 1/1998 (ECSR, 9 September 1999) §32: 'The Committee recalls that the aim and purpose of the Charter, being a human rights protection instrument, is to protect effective rights not merely theoretically, but also in fact'. See also the case of *Marangopoulos Foundation for Human Rights v Greece* §194: the Committee recalls that the Charter is 'a living instrument whose purpose is to protect rights that are practical and not theoretical. Therefore, the Committee interprets the rights and liberties included in the Charter in the light of present-day conditions'.

[55] Cf. R Brillat, 'La Charte sociale européenne', in C Grewe (ed), *Les droits sociaux ou la démolition de quelques poncifs* (Presses universitaires de Strasbourg 2003) 83 ff.

[56] Cf. D Harris, 'The Council of Europe (II): The European Social Charter' in Raija Hanski and Marku Suski (eds), *An Introduction to the International Protection of Human Rights: A Textbook* (Åbo Akademi University 1999) 325.

[57] [2006] *Conclusions* 8.

[58] *CGT v France*, Complaint 55/2009.

[59] See, for instance, Law 106/72 of Cyprus and Italian law 1204/71. Cf. the case of the United Kingdom, which revised its legislation on illegitimate children in order to conform to the stipulations of Article 17.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

with high levels of social protection, like Sweden or Germany,[60] have been found guilty of irregularity concerning their conventional obligations and have had to revise their legislation. However, in the last years of the 1980s the influence of the Charter was relatively diminished, partly because of its lack of sanctions and partly because of the increase of the role of the European Union's social legislation. The reforms of the 1990s have significantly reversed this trend.[61]

Hence, governments are bound to take all necessary steps to ensure that the rights of the Charter are effective, either immediately or progressively, with regard to necessary structural changes.[62] But, what is the role of national courts, in case of inertia of the competent state authorities? As the Charter is a binding legal instrument one should expect that national judges could directly apply it, in pending cases related to its scope of protection. However, this is not the case in most national jurisdictions. According to the prevailing national case law the Social Charter is not applied to specific, individual cases, nor establishes a direct, subjective right without the intervention of the national authorities.[63]

Hence, according to this interpretation, the Charter establishes merely objective obligations for the states and not subjective rights. This signifies, among other things, that without legislative specification, no appeal to the Charter's provisions before the courts may take place. Still, there is not any reason for considering the rights contained in the Charter not directly enforceable subjective rights, except for the traditional ideological stance on the dichotomy between social rights and traditional freedoms, with regard to their justiciability.

The related arguments include:[64] the assertion that social rights, unlike civil and political rights, are by their nature resource intensive, and consequently unrealisable without a prior intervention of the legislator;[65] the claim that courts cannot adjudicate on social rights because of the positive obligations they impose, whereas civil and political rights are said to impose only negative obligations;[66] the claim that the courts, because of their procedural set up and the skill set available to the average judge, are

---

[60] They both revised their legislation concerning the education of young workers, according to Article 7(3) and (9) of the Charter.

[61] See D Harris, *The European Social Charter* (University Press of Virginia, 1994); D Harris, 'The European Social Charter', in D Gomien, D Harris and L Zwaak (eds), *Law and Practice of the European Convention on Human Rights and the European Social Charter* (Council of Europe Publishing 1996); AW Heringa, 'Social Rights and the Rule of Law', in *The Social Charter of the 21st Century* (Council of Europe Publishing 1997), 192.

[62] [2009] *General Introduction to Conclusions XIX-2* (Strasbourg).

[63] Cf. Th Aubert-Monpeyssen, 'Fundamental social rights and the French Judge', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux* (Bruylant 2008); R Brillat, 'The European Social Charter and Monitoring its Implementation', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux* (Bruylant 2008).

[64] Cf. IE Koch, 'The Justiciability of Indivisible Human Rights' (2003) 2 *Nordic Journal of International Law* 5.

[65] See A Neier, 'Social and Economic Rights: A Critique' (2006) 13(2) *Human Rights Brief* 1.

[66] See T Macklem, 'Entrenching Bills of Rights' (2006) 26 *Oxford Journal of Legal Studies* 107, 115–120.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

institutionally ill-suited to adjudicate on matters with potentially significant economic and social policy implications.

This argumentation, especially with regard to the positive–negative dichotomy, has been undermined by the widespread acceptance of a tripartite typology initially developed by Henry Shue, which acknowledges that all human rights impose three levels of obligation on states: the obligations to respect, protect and fulfil.[67] This taxonomy makes it clear that all human rights, whether social or civil and political, impose a bundle of both positive and negative obligations on states. In light of this, rights cannot coherently be distinguished by the kind of duty to which they give rise. The approach of the case law of the ECHR and the Committee of Social Rights is another clear sign of the negation of the inherent differentiation between different categories of rights.[68]

The reaffirmation of the rights of Article 12 as a genuine, subjective and fully enforceable right to social security would be not only an important guarantee against regression of social protection, but also a major contribution to the establishment of a new European social citizenship, leading to a more fair, equitable and just society.[69]

BIBLIOGRAPHY

Akandji-Kombe, JF (2000), 'L'application de la Charte sociale européenne; la mise en œuvre de la procédure des réclamations collectives', *Droit social* 888.

Akandji-Kombe, JF (2001), 'La procédure des réclamations collectives dans la Charte sociale européenne', *RTDH* 1035 ff.

Akandji-Kombe, JF (2008), 'The European Social Charter and the UN Covenant on Economic, Social and Cultural Rights', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux*, Brussels: Bruylant.

Akandji-Kombe, JF and S Leclerc (eds) (2001), *La Charte sociale européenne*, Brussels: Bruylant.

Aubert-Monpeyssen, Th (2008), 'Fundamental Social Rights and the French Judge', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux*, Brussels: Bruylant.

Brillat, R (2003), 'La Charte sociale européenne', in C Grewe (ed), *Les droits sociaux ou la démolition de quelques poncifs*, Strasbourg: Presses universitaires de Strasbourg, 83 ff.

Brillat, R (2008), 'The European Social Charter and Monitoring its Implementation', in N Aliprantis (ed), *Les droits sociaux dans les instruments européens et internationaux*, Brussels: Bruylant.

Chatton Gregor, T (2008), 'L'harmonisation des pratiques jurisprudentielles de la Cour européenne des Droits de l'Homme et du Comité européen des Droits sociaux: une évolution discrète', in C Chappuis, B Bénédict Foëx and T Kadner Graziano (eds), *L'harmonisation internationale du droit*, Zürich: Editions Schulthess, 45 ff.

De Schutter, O and M Sant'Ana (2012), 'The European Committee of Social Rights', in Gauthier de Beco (ed), *Human Rights Monitoring Mechanisms of the Council of Europe*, London and New York: Routledge.

Eide, A (2001), 'Economic, Social and Cultural Rights as Human Rights', in A Eide, K Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook*, 2nd edn, The Hague: Martinus Nijhoff, 9 ff.

---

[67] A Eide, 'Economic, Social and Cultural Rights as Human Rights', in A. Eide, K Krause and A Rosas (eds), *Economic, Social and Cultural Rights: A Textbook* (Martinus Nijhoff 2001) 9.

[68] Cf. among others S Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press 2008), 67; G Katrougalos and P O'Connell, 'Fundamental Social Rights', in M Tushnet et al. (eds), *Routledge Handbook of Constitutional Law* (Routledge 2012) 375–387.

[69] MA Moreau, *Normes sociales, droit du travail et mondialisation* (Dalloz 2006).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

Fredman, S (2008), Human Rights Transformed: Positive Rights and Positive Duties, Oxford: Oxford University Press.
Fuchs, K (1994), 'The European Social Charter: Its Role in Present-Day Europe and Its Reform' in Krzysztof Drzewicki, Catarina Krause and Allan Rosas (eds), *Social Rights as Human Rights: A European Challenge*, Åbo: Åbo Akademi University, 151 ff.
Harris, D (1994), *The European Social Charter*, Charlottesville: University of Virginia.
Harris, D (1996), 'The European Social Charter', in D Gomien, D Harris and L Zwaak (eds), *Law and Practice of the European Convention on Human Rights and the European Social Charter*, Strasbourg: Council of Europe Publishing.
Harris, D (1997), 'The Collective Complaints Procedure', in Council of Europe, *The Social Charter of the 21st Century*, Strasbourg: Council of Europe Publishing.
Harris, D (1999), 'The Council of Europe (II): The European Social Charter' in Raija Hanski and Marku Suski (eds), *An Introduction to the International Protection of Human Rights: A Textbook*, 2nd edn, Åbo: Åbo Akademi University 325.
Harris, DJ and J Darcy (2001), *The European Social Charter*, New York: Transnational Publishers.
Hendriks, A (1996), 'Revised European Social Charter', *Netherlands Quarterly of Human Rights*, **14**(3) 341–342.
Heringa, AW (1997), 'Social Rights and the Rule of Law', in Council of Europe, *The Social Charter of the 21st Century*, Strasbourg: Council of Europe Publishing 192.
Katrougalos, G (2010), 'Constitutional Limitations of Social Security Privatisation', *European Journal of Social Security*, **12**(1) 16.
Katrougalos, G and P O'Connell (2012), 'Fundamental Social Rights', in M Tushnet et al. (eds), *Routledge Handbook of Constitutional Law*, London and New York: Routledge, 375–387.
Koch, IE (2003), 'The Justiciability of Indivisible Human Rights', *Nordic Journal of International Law* **2** 3, 5.
Laralde, JM (2001), 'Charte sociale européenne et Convention européenne des droits de l'Homme', in JF Akandji-Kombe and S Leclerc (eds), *La Charte sociale européenne*, Brussels: Bruylant, 136 ff.
Macklem, T (2006), 'Entrenching Bills of Rights', *Oxford Journal of Legal Studies* **26** 107, 115–120.
Mikkola, M (2010), *Social Human Rights of Europe*, Helsinki: Legisactio.
Moreau, MA (2006), *Normes sociales, droit du travail et mondialisation*, Paris: Dalloz.
Neier, A (2006), 'Social and Economic Rights: A Critique', *Human Rights Brief* **13**(2) 1.
Plantinga, M and A Tollenaar (2007), *Public Governance in the Dutch Welfare State, The Consequences of Privatisation for Securing Public Interests in the History of the Dutch Welfare State*, Paper for the panel 'Regulating Private Welfare Provision', 4th ECPR conference, Bremen.
Swiatkowski, AM (2007), *Charter of Social Rights of the Council of Europe*, Alphen a/d Rijn: Kluwer Law International.
Vaillancourt-Rosenau, P and Ch J Lako (2008), 'An Experiment with Regulated Competition and Individual Mandates for Universal Health Care: The New Dutch Health Insurance System', *Journal of Health Politics, Policy and Law* **33**(6) 1031–1055.
Valticos, N (1961), 'The European Social Charter and International Labour Standards', *International Labour Review* **89**(5).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:44:12PM
via University College London (UCL)

5. The interaction between human rights case law: Convergence or competition?

Ida Elisabeth Koch

I. INTRODUCTORY REMARKS

The right to social security as a fundamental right or as a human right is protected by several European sets of norms. However, the norms in question differ not only in their geographical range, but also as regards their normative character and strength. Since 1961 the right to social security and social assistance[1] has been protected primarily by Articles 12 and 13 of the European Social Charter (European Social Charter) and later in 1996 also by the Revised Social Charter ((R)European Social Charter). The European Committee on Social Rights has been assigned to monitoring the implementation of the right to social security and social assistance by means of the general reporting procedure and a collective complaints procedure. In that way the Committee has given substance to the provisions of the Charter(s).

In addition, the development of case law from the European Court of Human Rights unveils that in particular Article 8 and Protocol No 1(1) of the European Convention on Human Rights and Fundamental Freedoms (ECHR) provide some protection of socio-economic demands, which was not envisaged when the Convention entered into force in 1950. Therefore, it is no longer possible to uphold the traditional perception of the ECHR as a Convention entirely for the protection of civil and political rights.

Moreover, the Lisbon Treaty with its reference in Article 6(1) to the EU Charter of Fundamental Rights entered into force in 2009. The Charter includes socio-economic rights and refers in its Preamble to the European Social Charter and the ECHR as well as the 'indivisible, universal values of human dignity, freedom, equality and solidarity; …'. Socio-economic rights including Article 34 on social security appear in the section about *Solidarity*. The legal content of Article 34 is somewhat uncertain and the competence to interpret and give substance to the provision rests with the European Court of Justice.

Thus, the question to be discussed in this chapter is how the three instruments and their respective judicial monitoring bodies relate to one another in their interpretation of social security rights in the European Social Charters, the ECHR and the EU Charter on Fundamental Rights respectively. The purpose of the chapter is to give an account of the nature and extent of the protection under the three human rights instruments and to discuss whether they are in convergence or competition when it comes to the protection of the right to social security. Do the three judicial bodies, the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice

[1] The distinction between social assistance and social security is blurred. In this context the term social security or social cash benefits will be preferred.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

enter into a dialogue on a harmonious interpretation of their respective legal instruments, and how can we envisage the future protection of the right to social security in the Council of Europe (COE) and the EU? For pedagogical and synoptic reasons the chapter will begin with a short presentation of relevant case law from the European Court of Human Rights.[2]

II. THE EUROPEAN CONVENTION ON HUMAN RIGHTS (ECHR)

II.i Background and Field of Application

The ECHR applies to all Member States under the COE because ratification of the Convention is a precondition for Council of Europe membership. However, as a point of departure, the ECHR is definitively not the place to look for provisions providing the individual with a right to social security. There is nothing in the wording of the ECHR about socio-economic rights, and in most of the lifetime of the Convention it was applied to civil and political rights and these rights only.

The reasoning behind this originally limited scope of the ECHR was explained in the following way by Teitgen, who was rapporteur for the Committee which prepared the first draft of the ECHR:

> It [the Committee] considered that, for the moment, it is preferable to limit the collective guarantee to those rights and essential freedoms which are practised, after long usage and experience, in all the democratic countries. While they are the first triumph of democratic regimes, they are also the necessary condition under which they operate. Certainly, professional freedoms and *social rights, which have themselves an intrinsic value, must also, in the future, be defined and protected.* Everyone will, however, understand that *it is necessary to begin at the beginning* and to guarantee political democracy in the European Union and then to coordinate our economies, before undertaking the generalisation of social democracy [emphasis added].[3]

Teitgen's perception of the range of protection of the ECHR was, however, abandoned long ago and today the right to social security is in fact to some extent protected by the ECHR and its protocols.

The European Court of Human Rights applies a dichotomous terminology by recognising that the ECHR includes 'negative' as well as 'positive' elements. However, the Court seems to be increasingly aware of the fact that some obligations defy classification as either 'positive' or 'negative'. The Court is not preoccupied with the issue of fitting a certain obligation into a certain category, but rather with effective human rights protection. The following quotation from the well-known *Airey* case illustrates very well how the Court understands the relation between the two sets of rights:

---

[2] For a more thorough presentation of European Court of Human Rights case law, see Chapter 3 of this volume.

[3] Council of Europe, Cons Ass, *First Session, Reports* (Strasbourg 1949) 1144.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> Whilst the Convention sets forth what are essentially civil and political rights, *many of them have implications of a social or economic nature*. The Court therefore considers … that the mere fact that an interpretation of the Convention may extend into the sphere of social and economic rights should not be a decisive factor against such an interpretation; *there is no water-tight division separating that sphere from the field covered by the Convention* [emphasis added].[4]

Case law in general is illustrative of the fact that the Court has a very relaxed attitude to the issue of categorisation. The Court is perfectly aware of the fact that the 'positive' and the 'negative' are closely interlinked, and that it is hardly possible to make a distinction between the two. Instead of insisting on either category, the Court simply accepts that many provisions, e.g. Article 8, encompass elements of both. The following passage is illustrative:

> [W]hile the essential object of Article 8 is to protect the individual against arbitrary interference by the authorities, … there may be positive obligations inherent in an effective respect for the applicant's rights protected under Article 8 … . *However, the boundaries between the State's positive and negative obligations under article 8 do not lend themselves to precise definitions* [emphasis added].[5]

Judge Wildhaber has given the following reflections on the distinction between the 'positive' and the 'negative':

> However, *the dividing line between negative and positive obligations is not so clear-cut*. In the Gaskin case, the refusal by the British authorities to grant a former child in care unrestricted access to child-care records could be considered as a *negative interference*, whereas a duty on the State to provide such access could arguably be viewed as a *positive obligation*. In the Cossey case … [t]he refusal of the United Kingdom to carry out a modification of its system for recording civil status could be analysed either as a *negative interference* with the applicant's rights or as a violation of the State's *positive obligation* to adapt its legislation so as to take account of the applicant's situation. The Keegan case against Ireland concerned the placement of a child for adoption without the natural father's knowledge or consent … . This state of affairs could be taken as a *negative interference* with the father's right to respect for his family life or as a failure by Ireland to fulfil a *positive obligation* to confer a right of guardianship on natural fathers. Again, in the instant case of Stjerna, the refusal by the Finnish authorities to allow the applicant freely to acquire the surname of his ancestors may be perceived as either a *negative* or a *positive interference*.[6]

On this basis, Judge Wildhaber found it preferable to construe the notion of interference so as to cover facts capable of breaching an obligation, whether 'positive' or 'negative'. Judge Wildhaber's in my opinion quite constructive proposal has not been fully recognised, but the cases referred to illustrate not only that the Court recognises that the Convention encompasses 'positive' and 'negative' obligations, but also that the distinction between the two is blurred. However, the Court abstains from trying to define the indefinable, and the unclear boundaries between the two obligations seem to

---

[4] *Airey v Ireland* (ECHR, 9 October 1979) para 26.

[5] *Pibernik v Croatia* (ECHR, 4 March 2004) paras 64 and 65. The quoted passage was used for the first time in *Keegan v Ireland* (ECHR, 26 May 1994) para 49.

[6] *Stjerna v Finland* (ECHR, 25 November 1994), concurring opinion of Judge Wildhaber.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

be no hindrance for the Court in its concrete decision making. On the contrary, the Court has been able to develop a case law providing for even very remarkable protection of social demands without insisting on fitting the obligatory measures into a certain category.

In particular, Articles 3, 6, 8 and Article 1 of Protocol No 1 have been shown to be important for the protection of socio-economic rights. In this context, however, I will not go into detail about the protection of social security issues under any of the articles referred to as the topic is covered in more detail in Chapter 3 of this volume.

II.ii Case Law on Article 3 and Social Security

The Court has left a door open for holding that absolutely insufficient social cash benefits may raise an issue under Article 3, cf e.g. *Pancenco v Latvia*, *Larioshina v Russia* and *Budina v Russia*.[7] Moreover, in *MSS v Belgium and Greece*, about living conditions for asylum seekers, the Court did in fact find that Article 3 had been violated. The Court considered

> that the applicant has been the victim of humiliating treatment showing a lack of respect for his dignity and that this situation has, without doubt, aroused in him feelings of fear, anguish or inferiority capable of inducing desperation. It considers that such living conditions, combined with the prolonged uncertainty in which he has remained and the total lack of any prospects of his situation improving, have attained the level of severity required to fall within the scope of Article 3 of the Convention.[8]

The factual circumstances in *MSS* were outrageous, however one may wonder whether it is less painful to live on a social cash benefit way below existence level (*Pancenco*) than to have a stroke of the birch on one's behind, cf e.g. *Tyrer v the United Kingdom*.[9]

II.iii Case Law on Article 6 and Social Security

Article 6 extends into the sphere of social rights due to the Court's interpretation of the expression 'civil rights and obligations' which is one of the requirements for invoking the fair trial clause. Thus, in the determination of civil rights everyone is entitled to procedural protection of a quite wide-ranging character, which might even have substantial implications.[10] In case law social cash benefits have gradually been accepted as 'civil rights' in the sense of Article 6, and in that way the protection of social cash benefits has been intensified. The Court's approach to the interpretation of the notion is very well reflected in the following passage, which has been repeated in case law over the years:

> Whether or not a right is to be regarded as civil within the meaning of this expression in the Convention must be determined by reference to the *substantive content and effects* of the

---

[7] Cf e.g. *Pancenco v Latvia* Admissibility (ECHR, 28 October 1999), *Larioshina v Russia*, Admissibility (ECHR, 23 April 2002) and *Budina v Russia* Admissibility (ECHR, 18 June 2009).

[8] *MSS v Belgium and Greece* (ECHR, 21 January 2011) para 263.

[9] *Tyrer v the United Kingdom* (ECHR, 25 April 1978).

[10] *Schuler-Zgraggen v Switzerland* (ECHR, 24 June 1993).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> right – and not its legal classification – under the domestic law of the State concerned. In the exercise of its supervisory functions, the Court must also take account of the *object and purpose* of the Convention and of the national legal systems of the other Contracting States … [emphasis added].[11]

The Court has dealt with *social security* benefits in e.g. the *Feldbrugge* and the *Deumeland* cases.[12] Moreover, in 1993 the Court was to decide on the applicability of Article 6 in relation to statute-based welfare *assistance*. The benefit in this case – the *Salesi* case[13] – concerned a disability allowance, which was not dependent on the payment of individual contributions. It was entirely publicly financed.

The Court repeated what it had already stated in the *Feldbrugge* and *Deumeland* cases, namely that 'there was a great diversity in the legislation and practice of the member States of the Council of Europe as regards the nature of the entitlements to insurance benefits under social security schemes'. Some States treat them as private law rights, some as a public law rights, and yet again some States operate a mixed system. The Court therefore held that the 'development in the law that was initiated by those judgments and the principle of equality of treatment warrant taking the view that *today the general rule is that Article 6 para. 1 … does apply in the field of social insurance* [emphasis added]'.[14]

As regards the differences between social security and social assistance the Court found that 'they cannot be regarded as fundamental at the present stage of development of social security law'.[15] Accordingly, Article 6(1) was applicable.

II.iv Case Law on Article 8 and Social Security

Also Article 8 has appeared to be relevant with regard to social cash benefits, cf e.g. *Petrovic v Austria* about parental leave for fathers although the Court did not in that case find a violation of Article 8 taken in conjunction with Article 14.[16] The reasoning behind the judgment was that at the material time there was not yet common ground in the Council of Europe Member States with regard to parental leave for fathers. That has changed, however, because in *Konstantin Markin v Russia*[17] the Court recognised that society has changed and that parental leave also for fathers has now become the general rule. Mention should also be made of *Niedzwiecki v Germany* concerning child benefits.[18] In the latter case the Court argued as follows with reference to the *Petrovic* case:

> By granting child benefits, States are able to demonstrate their respect for family life within the meaning of Article 8 of the Convention; the benefits therefore come within the scope of

---

11 Cf. originally in *König v Germany* (ECHR, 28 June 1978) para 89.
12 *Feldbrugge v the Netherlands* and *Deumeland v Germany* (ECHR, 29 May 1986).
13 *Salesi v Italy* (ECHR, 26 February 1993).
14 Ibid para 19.
15 Ibid.
16 *Petrovic v Austria* (ECHR, 27 March 1998).
17 *Konstantin Markin v Russia* (ECHR, 22 March 2012).
18 *Niedzwiecki v Germany* (ECHR, 25 October 2005).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> that provision (see, *mutatis mutandis*, *Petrovic*, cited above, § 30). It follows that Article 14 – taken together with Article 8 – is applicable.[19]

This approach has been followed in a number of cases.[20]

II.v Case Law on Article 1 of Protocol No 1 and Social Security

On several occasions the European Court of Human Rights has had to consider whether social cash benefits may be considered possession in the sense of Article 1 of Protocol No 1. This question was originally seen as closely connected with the way in which the benefit in question was financed. Originally individual contributions to a social scheme were considered necessary for the benefit in question to be regarded as possession; however, this perception has gradually been abandoned and today the state of the law has changed radically.

In *Gaygusuz v Austria* the Court began to flirt with the idea of abandoning the requirement that individual contributions were necessary for considering the security benefit in question as possession in the sense of Article 1 of Protocol No 1. Gaygusuz was denied the benefit in question because he was a Turkish and not an Austrian citizen. The Court considered that the benefit 'is a pecuniary right for the purposes of Article 1 of Protocol No 1 … . That provision … is therefore applicable *without it being necessary to rely solely on the link between entitlement to emergency assistance and the obligation to pay 'taxes or other contributions'* [emphasis added].'[21]

This – somewhat cryptic – remark was subsequently subject to various interpretations.[22] However, in *Stec and Others* about pension rights for women the matter was eventually settled. Sitting as a Grand Chamber the Court held as follows:

> The Court's approach to Article 1 of Protocol No 1 should reflect the reality of the way in which welfare provision is currently organised within the Member States of the Council of Europe. It is clear that within those States, and within most individual States, there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Benefits are funded in a large variety of ways: some are paid for by contributions to a specific fund; some depend on a claimant's contribution record; many are paid for out of general taxation on the basis of a statutorily defined status … Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of Protocol No 1. Moreover, to exclude benefits paid for out of general taxation would be to disregard the fact that many claimants under this latter type of system also contribute to its financing, through the payment of tax. In the modern, democratic State, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfillment of the conditions of eligibility – as of right. Where an individual has assertable

---

19 Ibid para 31.
20 Cf e.g. *Fawsie v Greece* and *Saidoun v Greece* (ECHR, 28 October 2010).
21 *Gaygusuz v Austria* (ECHR, 16 September 1996) para 41.
22 For a more detailed account, see Chapter 3 of this volume.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> right under domestic law to a welfare benefit, the importance of that interest should also be reflected by holding Article 1 of Protocol No 1 to be applicable.[23]

Accordingly, the pension in question could be considered possession for the purposes of Article 1 of Protocol No 1, and Article 14 of the Convention was therefore applicable. The Court, however, in its judgment held as follows:

> On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy … . Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation …'.[24]

However, one of the major reasons for the Court's not finding a violation of Article 1 of Protocol No 1 in conjunction with Article 14 may have been the following: 'Given the extremely far-reaching and serious implications, for women and for the economy in general, these are matters which clearly fall within the State's margin of appreciation.'[25] This conclusion is hardly surprising given the fact that the benefit in question was applicable to half the population of the United Kingdom. The budgetary implications were indeed far reaching. However, the fact that entitlements to tax-financed benefits constitute possession for the purposes of Article 1 of Protocol No 1 has clearly been established, and the Court, once again, has brought coherence into the Convention complex. Moreover, later case law shows that the Court is not afraid of finding a violation if the domestic decision is not based on objective and reasonable justification.[26] In general, however, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy and the Court has often stated as follows:

> Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation …'.[27]

On the face of it, the Court's conclusion seems far reaching. However, it need not be. The consequences are probably manageable. First of all it should be emphasised that Article 1 of Protocol No 1 does not guarantee the right to *acquire* possessions. Thus, in *Stec and Others* the Court emphasised:

> that the principles … which apply generally in cases under Article 1 of Protocol No 1, are equally relevant when it comes to welfare benefits. In particular, the Article does not create a right to acquire property. It places no restriction on the Contracting State's freedom to decide

---

[23] *Stec and Others v the United Kingdom* Admissibility (ECHR, 6 July 2005) paras 50–51.
[24] *Stec and Others v the United Kingdom* (ECHR, 12 April 2006) para 52.
[25] Ibid, para 65.
[26] Cf e.g. *Zeman v Austria* (ECHR, 29 June 2006); and *Hobbs, Richards, Walsh and Green v the United Kingdom* (ECHR, 14 November 2006).
[27] *Stec and Others v the United Kingdom* (ECHR, 12 April 2006) para 52.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to provide under any such scheme … .[28]

Secondly, it should be recalled that the above-mentioned cases about Article 1 of Protocol No 1 concerned the issue of non-discrimination with regard to social cash benefits. The Protocol merely functioned as the vehicle which could bring the issue in question within the ambit of the non-discrimination clause in Article 14, and differential treatment only amounts to discrimination if it is not objective and reasonable.

Moreover, in matters of social policy the Court traditionally allows Member States a considerable margin of appreciation, and it must be assumed that the Court will exercise considerable self-restraint also in future assessments of the legitimacy of interference within the field of social benefits.

In the case law of the European Court of Human Rights referred to above there are no references to case law from the European Committee on Social Rights on the European Social Charter. However, that cannot be taken as a general indication that the Court finds the (R)European Social Charter irrelevant for the interpretation of the ECHR. On the contrary. In *Efe v Austria* on family allowances, for example, the Court referred to Article 12 of the European Social Charter and case law of the European Committee on Social Rights in the following way:

> The European Committee of Social Rights, in its Conclusions concerning Article 12 of the Charter in respect of Austria stated as follows:[29]
>
> As regards the payment of family benefits, the Committee considers that according to Article 12 § 4, any child resident in a State Party is entitled to the payment of family benefits on an equal footing with nationals of the State concerned. Therefore, whoever is the beneficiary under the social security system, i.e. whether it is the worker or the child, State Parties are under the obligation to secure through unilateral measures the actual payment of family benefits to all children residing on their territory. In other words, imposing an obligation of residence of the child concerned on the territory of the State is compatible with Article 12 § 4 and its Appendix. However since not all countries apply such a system, States applying the 'child residence requirement' are under the obligation, in order to secure equal treatment within the meaning of Article 12 § 4, to conclude within a reasonable period of time bilateral or multilateral agreements with those States which apply a different entitlement principle. The Committee therefore asks the next report to indicate whether such agreements exist with the following countries: Albania, Armenia, Georgia and Turkey, or, if not, whether it is envisaged to conclude them and in what time delay.
>
> The Committee asks for whether a length of residence or employment requirement is imposed on non-EU/EEA nationals of States Parties to the 1961 Charter or the revised Charter for receipt of any of the non-employment related social security benefits. As regards family benefits, the Committee refers to its conclusion under Article 16 in this volume. The Committee recalls that in its previous conclusion (Conclusion XVII-1, p. 36) it found the situation in conformity as regards retention of accrued benefits also for nationals of other States Parties which are currently uncovered by any agreement. Such countries are currently Albania, Andorra, Armenia, Azerbaijan, Georgia and Moldova. The

[28] Ibid, para 54.

[29] 18th report, reference period 2003–2004 *Conclusions* XVIII-1.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> Committee asks confirmation of whether the principle of retention of benefits applies to nationals of all these countries.[30]

The Committee did not find that Austria had violated Article 12 and the Court reached the same conclusion on the basis of Article 1 of Protocol No 1.

Moreover, In *Stefanetti and Others* the Court quoted the European Committee on Social Rights in the following way:

> The Committee further notes from MISSOC [EU's Mutual Information System on Social Protection] that in 2011 the amount of minimum pension (*pensione minima*) stood at €6 246.89 (€520 per month). The old-age pension (*pensione di vecchiaia*) is brought up to the amount of the minimum pension if the annual taxable income of the pensioner is less than twice the minimum pension. The Committee observes that the level of minimum pension falls below 40% of the median equivalised income (Eurostat) and is therefore inadequate. (page 29)
>
> When assessing adequacy of resources of elderly persons under Article 23, the Committee takes into account all social protection measures guaranteed to elderly persons and aimed at maintaining income level allowing them to lead a decent life and participate actively in public, social and cultural life.
>
> In particular, the Committee examines pensions, contributory or non-contributory, and other complementary cash benefits available to elderly persons. These resources will then be compared with median equivalised income. However, the Committee recalls that its task is to assess not only the law, but also the compliance of practice with the obligations arising from the Charter. For this purpose, the Committee will also take into consideration relevant indicators relating to at-risk-of-poverty rate for persons aged 65 and over.
>
> The Committee notes from MISSOC that no statutory minimum pension is provided for in the case of workers first insured starting from 1 January 1996; therefore, only pensions paid under the earnings-related scheme can be topped up till the minimum pension amount is reached. It is a means-tested benefit, therefore, in order to be entitled to it, personal income or household income must not exceed certain limits, which are set annually (€6 247 for a single person, approx. €521/month in 2011). The annual amount of minimum pension *(pensione minima)* amounted in 2011 to €6 076 (€506/month). Beneficiaries of a minimum pension may also receive a supplement or supplements. The information supplied by the Italian authorities mentions different supplements and provides different rates for these. …
>
> In addition, the report states that the Social Card – a magnetic card, funded by public funds and private donations, distributed by the Italian Mail Company, allows elderly persons on low income to use it to purchase food in certain shops or pay utility bills up to €40/month. It is available to persons over 65 with a pension below €6 000 per year (€8 000 if aged 70 or more), and financial holdings below €15 000.
>
> The Committee notes that 50% of the Eurostat median equivalised income in 2011 stood at €665 (40% at €532). The minimum pension falls below 40% of the Eurostat median equivalised income, therefore the Committee cannot assess the situation until it receives further information on the supplements available (see above question).
>
> The Committee notes from the supplementary information submitted by Italy that there is a social assistance allowance payable to those over 65 years of age and who have an income below €749.90. In 2012 the amount payable to a single person was €442.30 per month. The

[30] *Efe v Austria* (ECHR, 8 January 2013) para 25.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> Committee notes that this also falls below 40% of the Eurostat median equivalised income and again asks whether supplements or other benefits and allowance are payable. (Pages 44–45)[31]

It appears that the Committee augurs a future non-compliance with the European Social Charter. The Court, however, gets in ahead of the Committee by finding a violation of Article 1 of Protocol No 1.[32]

However, the European Court of Human Rights and the European Committee on Social Rights have entirely different approaches to the issue of social security as the normative basis for their decisions – the (R)European Social Charter and the ECHR are distinct. Articles 12 and 13 of the (R)European Social Charter give the individual citizen a positive right to social cash benefits whereas the ECHR does not give the individual a right to a social cash benefit of a certain amount. Article 1 of Protocol No 1 has its most important sphere of application in situations where the Protocol can be applied in conjunction with the non-discrimination clause in Article 14 of the ECHR, see Chapter 3.[33]

III. THE EUROPEAN SOCIAL CHARTER AND THE REVISED SOCIAL CHARTER

III.i Introduction and Field of Application

Whether or not everyone in fact understood that it was *necessary to begin at the beginning* as Teitgen asserted in 1949 is hard to tell. However, in 1965 the European Social Charter adopted in 1961 entered into force and in 1996 a more-up-to-date Revised European Social Charter was adopted. The (R)European Social Charter entered into force in 1999. Unlike the ECHR the (R)European Social Charter applies to a more limited number of Council of Europe States, because ratification of the Charters is not a condition for membership of the Council of Europe. The European Social Charter is ratified in all 43 Member States of which only 10 Member States have ratified the (R)European Social Charter.

Among the provisions in the Charter are Article 12 on the right to social security and Article 13 on the right to social and medical assistance. In this way the European gap in the protection of all the rights deriving from the Universal Declaration of Human Rights (UDHR) was filled.

---

[31] *Stefanetti v Italy* (ECHR, 15 April 2014) para 27.

[32] Similarly, in its interpretation of Article 11 of the ECHR the Court has strived for harmonisation with Articles 5 and 6 of the (R)European Social Charter and the Court and the ECSR have in fact had a dialogue on the interpretation of provisions relating to the rights of workers. Cf Ida Elisabeth Koch, *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights* (Martinus Nijhoff 2009) chapter 9.

[33] Cf also Maya Sigron, *Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights* (Intersentia 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

It is beyond doubt that the (R)European Social Charter gives the most detailed and comprehensive protection of social security in the Council of Europe region. That applies to Article 12 and Article 13, which are identical in the two treaties. Article 12 concerns social security whereas Article 13 requires that persons without means are granted adequate social assistance.[34]

According to (R)European Social Charter Article 12, paras 1–3, the Contracting Parties are under an obligation to establish or maintain a system of social security at a satisfactory level and to endeavour to raise progressively the social security system to a higher level. Paragraph 4 together with the Appendix to Article 12(4) concern the issue of equal treatment for the nationals of the other Contracting Parties.

Article 13, paras 1–3 of the (R)European Social Charter obliges the Contracting Parties to ensure that persons without adequate resources be granted adequate assistance whereas para 4 together with the Appendix provide a protection of nationals of the other Contracting Parties. Already in its first supervision circle the European Committee on Social Rights emphasised that Article 13 was not to be understood as a 'charity' provision; rather the provision was meant as one which entitles the individual to public assistance as a *legal* right. Accordingly, 'Contracting Parties are no longer merely empowered to grant assistance as they think fit; they are under an obligation which they may be called on in court to honour'.[35]

III.ii Case Law on Articles 12 and 13

There is hardly any doubt that the (R)European Social Charter is the most fine-meshed social security system in the Council of Europe and probably also in the UN. It provides a very detailed safety net which, however, shall not be dealt with in this context. Other authors of this handbook have greater knowledge on this issue, and what is dealt with in this context is limited to what is necessary to make a comparison with the right to social security under the ECHR and the EU Charter on Fundamental Rights.

As appears above in Section II.i the ECHR apparently does not provide any protection with regard to social security and social assistance. It places no restriction on the Contracting States' freedom to decide whether or not to have in place a social security system, or to choose the type or amount of a certain benefit under any such scheme. Nevertheless, the European Committee on Social Rights has on a number of occasions referred to case law from the European Court of Human Rights in its case law under the collective complaints procedure. In Complaint No 80/2012, for example, the Committee held as follows with reference to Article 1 of Protocol No 1 to the ECHR: 'However, where a Contracting State has in force legislation providing for the

[34] The Charter does not include a definition of the two concepts social security and social assistance. However, it appears from the wording of Article 13 that this provision concerns the lowest safety net, cf the phrase 'without adequate resources', which indicates that assistance should be based on a means test. For the ECSR's considerations on the distinction see Lenia Samuel, *Fundamental Social Rights. Case Law of the European Social Charter* (Council of Europe Publishing 2002) 284 ff.

[35] *Conclusions* 1, 64.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

payment as of right of a welfare benefit – whether conditional or not on the prior payment of contributions – that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 for persons satisfying its requirements (*Stec and Others v the United Kingdom*, [GC]) …'.[36] The Committee continued by referring to the case of *Kjartan Ásmundsson*[37] as follows:

> In the case of Kjartan Ásmundsson, a violation of the applicant's right to the peaceful enjoyment of his possessions was found by the Court, as the applicant had been deprived of the entirety of his disability pension entitlements, which at the time of the discontinuation of their payment had constituted one-third of the applicant's gross monthly income. In these circumstances, the Court held that 'as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities'. The Court concluded that this 'would have been otherwise, had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements'.[38]

It is worth noting that the European Committee on Social Rights had no need to refer to case law from the European Court of Human Rights in order to reach a result on the basis of the (R)European Social Charter. The Committee could easily have come to the same result on the basis of the (R)European Social Charter taken alone. It is quite conceivable to consider the reference to the ECHR as an attempt to bring coherence in the socio-economic protection system under the Council of Europe. Also, there is every probability that the European Committee on Social Rights – given its weakness as a monitoring body compared to the European Court of Human Rights – leans on the European Court of Human Rights' case law to boost the protection under the (R)European Social Charter.

This understanding of the approach of the European Committee on Social Rights is supported by Complaint No 14 under the collective complaint procedure in which the Committee made some general remarks about the Appendix to the Charter.

When deriving the legal content from the Appendix the Committee took as its point of departure Article 31(1) of the Vienna Convention on the Law of Treaties, according to which a treaty 'shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'. The Committee continued as follows:

> The Charter was envisaged as a human rights instrument to complement the European Convention on Human Rights. It is a living instrument dedicated to certain values which

---

[36] *Pensioners' Union of the Agricultural Bank of Greece (ATE) v Greece* Complaint No 80/2012 (ECHR, 7 December 2012) para 36.

[37] *Kjartan Ásmundsson v Iceland* (ECHR, 12 October 2004).

[38] Ibid, para 39 with reference to *Kjartan Ásmundsson v Iceland* (ECHR, 12 October 2004) paras 44–45. Cf also *Panhellenic Federation of the Public Electricity Corporation (POS-DEI) v Greece* Complaint No 79/2012 (ECSR 7 December 2012) paras 35–41; *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece* Complaint no 78/2012 (ECHR, 7 December 2012) paras 35–41.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> inspired it: dignity, autonomy, equality and solidarity. The rights guaranteed are not ends in themselves but they complete the rights enshrined in the European Convention on Human Rights.
>
> Indeed, according to the Vienna Declaration of 1993, all human rights are 'universal, indivisible and interdependent and interrelated' (para 5). The Committee is therefore mindful of the complex interaction between both sets of rights.
>
> Thus, the Charter must be interpreted so as to give life and meaning to fundamental social rights. It follows inter alia that restrictions on rights are to be read restrictively, i.e. understood in such a manner as to preserve intact the essence of the right and to achieve the overall purpose of the Charter.[39]

The quotation is a manifest illustration of the wish of the European Committee on Social Rights to take up the position as the socio-economic counterpart to the European Court of Human Rights. Moreover, the quotation clearly indicates that the European Committee on Social Rights perceives human rights – as they appear from the ECHR and the (R)European Social Charter – as two sides of the same coin. The quotation contradicts Teitgen's perception of the two sets of rights – civil-political rights and socio-economic rights – as two separate categories; rather it bridges the rights in the ECHR and the R(European Social Charter) in good compliance with the notion of human rights as indivisible, interrelated and interdependent.[40]

IV. THE EU CHARTER ON FUNDAMENTAL RIGHTS

IV.i Background and Field of Application

In 2009 the Lisbon Treaty with its reference in Article 6(1) to the EU Charter of Fundamental Rights entered into force. In the Preamble one will find the following phrase about the background and purpose of the Charter:

> This Charter reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Union and by the Council of Europe and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. In this context the Charter will be interpreted by the courts of the Union and the Member States with due regard to the explanations prepared under the authority of the Praesidium of the Convention which drafted the Charter and updated under the responsibility of the Praesidium of the European Convention.

Thus, the Charter reaffirms the rights of the human rights instruments of the COE, the ECHR and the (R)European Social Charter.[41] Only the field of application of the

---

[39] *International Federation of Human Rights Leagues (FIDH) v France* Collective Complaint No 14/2003(ECSR, 8 September 2004).

[40] Vienna Declaration and Programme of Action, Section 1, para 5, 1993.

[41] See also the Explanation to the EU Charter on Fundamental Rights.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

Charter is limited to EU Member States. Socio-economic rights appear in the section about *Solidarity*, and if the Court of Justice chooses to take seriously the solidarity rights of the Charter it might have a knock-on effect on the development under the ECHR.[42]

IV.ii Rights, Freedoms and Principles

The Charter makes a distinction between *rights* and *freedoms* on the one hand and *principles* on the other, see the Preamble and Article 51(1) which applies the language 'respect the rights, observe the principles'. According to Article 52(5) *principles* may be implemented by legislative and executive acts taken by institutions and bodies of the Union, and by acts of Member States. The Article says that:

> [T]he provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. *They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality* [emphasis added].

What exactly that implies is uncertain, however the distinction might weaken the clout of the Charter. It is not certain what exactly the difference between *rights* and *principles* is and only time will tell whether the distinction is just another way of questioning the justiciability of the solidarity principle or socio-economic rights. It has been held that the distinction refers to the difference between socio-economic rights vs civil-political rights. De Vries writes as follows:

> But the impact of this provision may be limited in so far as principles normally have to be further elaborated by the Union and as the courts are not really capable of reviewing such principles extensively. They are sometimes so vaguely formulated that it will be difficult for the Courts to enforce them. The problem, however remains that it cannot always be deduced from the explanations relating to the Charter of Fundamental Rights which provisions concern rights and which concern principles.[43]

Some seem convinced that *principles* are not justiciable, or at least not in the same way as *rights* can be. In fact principles come into play only in the interpretation of EU primary and secondary law or of domestic legislation (and practice) when implementing the former.[44] However, some of the articles on socio-economic or solidarity rights

---

[42] The Explanation to the EU Charter on Fundamental Rights includes the following reference to (R)European Social Charter: 'The principle set out in Article 34(1) is based on … Article 12 of the European Social Charter … . The second paragraph is based on Article 13(4) of the European Social Charter … . The third paragraph draws on Articles 30 and 31 of the revised Social Charter …'.

[43] Sybe A de Vries, 'The Protection of Fundamental Rights within Europe's Internal Market' in Sybe de Vries et al. (eds), *The Protection of Fundamental Rights in the EU after Lisbon* (Hart Publishing 2013) 72.

[44] Cerena Coppola, 'Social Rights in the European Union: The Possible Added Value of a Binding Charter of Fundamental Rights' in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument* (Springer 2009) 209.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

do in fact apply the term *right*, e.g. Article 31 which requires that '[e]very worker has the *right* to working conditions which respect his or her health, safety and dignity [emphasis added]'. Article 34(1) on social security and social assistance makes use of the term *entitlement*, which in modern English usage is similar to *right*. The Article reads as follows:

> The Union *recognises* and *respects* the *entitlement* to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices [emphasis added].

While the use of the term *entitlement* seems to indicate that social security benefits are justiciable, the use of the term *recognise* might point in the opposite direction. However, Article 51(1), which applies the language 'respect the rights, observe the principles', seems to apply the term *respect* to indicate that the rights are in fact justiciable. It is also a bit confusing though that Article 52(3) includes the following phrase:

> In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.

Given the fact that the Charter is built also on the (R)European Social Charter one must ask why Article 52 seems to ignore the existence of these instruments and their importance for the interpretation of the EU Charter.

Of significance for the interpretation of the Charter is probably also the choice of language in e.g. Article 35, which provides the right to health care, however only *under the conditions established by national laws and practices*. This modification may have as an impact that the social rights protection is watered down. That, however, remains to be seen.

IV.iii Case Law on Articles 1 and 34

Case law from the Court of Justice is sparse to put it mildly and makes only a modest contribution to the understanding of the legal content of Article 34. In the case *Kamberaj* the Court of Justice referred to Article 34 in a dispute on housing assistance which involved the question of the right understanding of the term 'core benefits' in Directive 2003/109. The Court of Justice held as follows with regard to Article 34:

> It follows that, when determining the social security, social assistance and social protection measures defined by their national law and subject to the principle of equal treatment enshrined in Article 11(1)(d) of Directive 2003/109, the Member States *must comply with the rights and deserve the principles provided for under the Charter, including those laid down in Article 34 thereof*. Under Article 34(3) of the Charter, in order to combat social exclusion and poverty, the Union (and thus the Member States when they are implementing European Union law) 'recognises and respects the right to social and housing assistance so as to ensure

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

> a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by European Union law and national law and practises' [emphasis added].[45]

The quoted phrase does not provide us with an understanding of the legal content of Article 34. Unfortunately, neither does the following statement from the Court of Justice contribute to the clarification of Article 34:

> [I]t should be recalled that according to Article 34 of the Charter, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources. It follows that, in so far as the benefit in question in the main proceedings fulfils the purpose set out in that article of the Charter, it cannot be considered, under European Union law, as not being part of the core benefits within the meaning of Article 11 (4) of Directive 2003/109 … .[46]

What can be deduced from this case, however, is that the Charter makes up a legal source relevant for the interpretation of Union legislation even if the provision of the Charter, in this case Article 34, is considered a principle rather than a right. Mention should also be made of a recent judgment about minimum standards for the reception of asylum seekers in the Member States according to Directive 2003/9/EC. In the judgment the Court of Justice refers to Article 1 of the Charter according to which '[h]uman dignity is inviolable. It must be respected and protected.'

> In addition, the general scheme and purpose of Directive 2003/9 and the observance of fundamental rights, in particular the requirements of Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected preclude the asylum seeker from being deprived – even for a temporary period of time after the making of the application for asylum and before being actually transferred to the responsible Member State – of the protection of the minimum standards laid down by that directive (see *Cimade and GISTI*, para 56).[47]

This approach is similar to the one followed by the German Federal Constitutional Court in its judgment on social benefits according to the Hartz IV Legislation. In this case the Court decided that the legislation in question did not comply with the constitutional requirement following from Article 1.1 of the Basic Law (*Grundgesetz* – GG) in conjunction with Article 20.1 GG to guarantee a subsistence minimum that is in line with *human dignity*.[48] This judgment has been confirmed by the German Federal Constitutional Court's judgment in a case about asylum seekers' right to social cash benefits.[49]

---

[45] Case C-571/10 *Kamberaj* nyr, para 80.

[46] Ibid, para 92.

[47] Cf Case C-79/13 *Saciri cs* nyr, para 35.

[48] German Federal Constitutional Court's judgment of 9 February 2010 on standard benefits according to the 'Hartz IV legislation'.

[49] German Federal Constitutional Court's judgment of 18 July 2012 on benefits for asylum seekers. Cf also Inga T Winkler and Claudia Mahler, 'Interpreting the Right to a Dignified Existence: A New Era in German Socio-Economic Rights Jurisprudence?' (2013) 13(2) *Human Rights Law Review* 388–401.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

In a recent publication on the EU Charter of Fundamental Rights, Robin White argues as follows: 'As a free-standing provision, Article 34 offers little.' The Explanation notably refers to the 'principle set out in Article 34(1)'. This indicates that the matters governed by the provision are not fully-fledged rights but depend upon implementation in European Union and national law.[50] She goes on as follows: 'Indeed a cynic might fairly remark that Article 34 hardly goes beyond the provisions of Articles 22 and 25 of the Universal Declaration of Human Rights in recognising the broad obligation of states to support those in need.'[51]

Robin White may be right in this rather pessimistic assessment of the legal strength of the Charter. Moreover, I do not have difficulties in following David Andersen and Cian C Murphy when they hold that '[i]n the absence of precise guidance, the distinction between rights and principles, though important, seems set to remain obscure and unpredictable.'[52] Nevertheless, at the present stage of development of the Court of Justice jurisprudence, the door seems open for the Court to interpret Article 34 in a way which strengthens the protection of social security issues under the EU Charter. If that happens future case law from the Court of Justice may have a knock-on effect on the development under the ECHR and maybe also the (R)European Social Charter.

V. CONCLUDING REMARKS

In conclusion, a lot has happened since Teitgen more than 60 years ago presented his view that everyone will, however, understand that '*it is necessary to begin at the beginning* and to guarantee political democracy in the European Union and then to coordinate our economies, before undertaking the generalisation of social democracy [emphasis added]'.[53] The debate on social democracy or the judicial protection of socio-economic rights is lively as never before. A dialogue is ongoing not only among legal scholars and NGOs, but also between treaty bodies and international and domestic courts. In good accordance with the Vienna Convention on the Law of Treaties[54] the spectrum of recognised legal sources has indeed developed and today any legal source which can be traced back to the UDHR is a recognised source.

The three instruments – the ECHR, the (R)European Social Charter and the EU Charter – each have their field of application, however they overlap to a certain extent. The monitoring bodies seem perfectly aware of the existence and importance of provisions in all three instruments and the inclusion of the entire range of human rights

---

[50] Robin White, 'Article 34 Social Security and Social Assistance' in Steve Peers, Tamara Hervey, Jeff Kenna and Angela Ward (eds), *The EU Charter on Fundamental Rights, a Commentary* (Hart Publishing 2014) 937.

[51] Ibid.

[52] David Andersen and Cian C Murphy, 'The Charter of Fundamental Rights', in Andrea Biondi et al (eds), *EU Law after Lisbon* (Oxford University Press 2012) 162.

[53] Council of Europe, Cons Ass, *First Session, Reports* 1949, 1144.

[54] Articles 31–32.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

in the EU Charter confirms the conception that human rights are indivisible, interrelated and interdependent.[55] Moreover, case law under the Optional Protocol to the ICESCR might in time have an impact on the development in the COE and the EU and the same applies to the Optional Protocol to the Convention on the Rights of People with Disabilities.

The interaction between the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice seems hesitant but searching, and it is premature to put forward firm conclusions. The interpretation of the ECHR, the (R)European Social Charter and the EU Charter on Fundamental Rights has hardly reached its final stage and might never come to a halt. Human rights are 'unfinished' rights which are likely to be influenced by new sets of facts. Moreover, case law confirms the relevance of having a contextual and hermeneutic perspective on the interpretation of the three instruments, and that the notion of abstract interpretation has limited meaning. It is good to remember the hermeneutic doctrine *understanding is always application*[56] and the three instruments have only been challenged to a limited degree.

BIBLIOGRAPHY

Andersen, D and Cian C Murphy (2012), 'The Charter of Fundamental Rights', in Andrea Biondi et al (eds), *EU Law after Lisbon*, Oxford: Oxford University Press, 162 ff.

Coppola, Cerena (2009), 'Social Rights in the European Union: The Possible Added Value of a Binding Charter of Fundamental Rights', in Giacomo Di Federico (ed), *The EU Charter of Fundamental Rights – From Declaration to Binding Instrument*, Heidelberg: Springer, 209 ff.

De Vries, Sybe (2013), 'The Protection of Fundamental Rights within Europe's Internal Market' in Sybe de Vries et al (eds), *The Protection of Fundamental Rights in the EU after Lisbon*, Oxford and Portland Oregon: Hart Publishing, 72.

Gadamer, Hans-Georg (1989), *Truth and Method*, 2nd revised edition, London: Sheed and Ward.

Koch, Ida Elisabeth (2009), *Human Rights as Indivisible Rights – The Protection of Socio-Economic Demands under the European Convention on Human Rights*, Leiden: Martinus Nijhoff.

Lenia, Samuel (2002), *Case Law of the European Social Charter*, 2nd edition, Strasbourg: Council of Europe Publishing.

Sigron, Maya (2014), *Legitimate Expectations Under Article 1 of Protocol No. 1 to the European Convention on Human Rights*, Antwerp: Intersentia.

White, Robin (2014), 'Article 34, Social Assistance and Social Security', in Steve Peers, Tamara Hervey, Jeff Kenna and Angela Ward (eds), *The EU Charter on Fundamental Rights, A Commentary*, Oxford: Hart Publishing, 937.

Winkler, Inga T and Claudia Mahler (2013), 'Interpreting the Right to a Dignified Existence: A New Era in German Socio-Economic Rights Jurisprudence?', *Human Rights Law Review* **13**(2) 388–401.

[55] Vienna Declaration and Programme of Action, Section 1, para 5, 1993.

[56] Hans Georg Gadamer, *Truth and Method* (Sheed and Ward 1989) 309.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:38:47PM
via University College London (UCL)

6. The approaches of the EU Court of Justice and the European Court of Human Rights vis-à-vis discrimination on the ground of nationality in social security

*Frans Pennings**

I. INTRODUCTION

The negotiations on the accession of the European Union to the European Convention on Human Rights (henceforth: ECHR or Convention) raise several complicated questions of a formal nature, e.g. on the relation between Member State(s) and the Union in a particular procedure before the European Court of Human Rights (Court of Human Rights) and on the coordination of the interpretation of EU law by the EU Court of Justice and the Court of Human Rights.[1] Considerable progress was made in this area,[2] but in December 2014 the Court of Justice delivered its opinion on the accession of the EU to the ECHR, and this raised important questions.[3] These issues will not be addressed here, because they are outside the scope of this volume.

Instead, I will focus on a material issue, i.e. a comparison of the approaches of both Courts in discrimination cases. This may become important when the EU finally accedes to the ECHR. It is, however, also important now, for academic purposes alone, since it shows alternative approaches and raises the need for explaining differences between the approaches.

Currently an instrument of EU law can already be the subject of cases before the Court of Human Rights in so far as a Member State has implemented this instrument. However, after the accession of the EU to the ECHR, EU law itself can be the subject

* This text was previously published in the *Utrecht Law Review*: Frans Pennings, 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?' (2013) 9(1) *Utrecht Law Review*. The editors considered it useful to include a slightly adapted version of this article to supplement the analysis of ECHR case law by Koch (Chapter 5 of this volume). The article is published here with the permission of *ULR*.

[1] See for a recent draft text of the accession agreement, CDDH-UE(2011)10 on the website of the Council of Europe, www.coe.int/t/dghl/standardsetting/hrpolicy/accession/Meeting_reports/CDDH-UE_2011_10_RAP_en.pdf (last visited 7 December 2012).

[2] *See*, for instance, T Lock, 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order' [2011] *CMLR* 1026 ff; see also JP Jacqué, 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms' (2011) *CMLR* 995 ff.

[3] Opinion 2/13, not yet reported, ECLI:EU:C:2014:2454.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

of procedures before the Court of Human Rights.[4] This means that EU rules and practice must satisfy the provisions of the Convention. For our purpose it is therefore relevant to investigate the areas where EU law allows discrimination on the ground of nationality while the ECHR does not. In exactly this area it can be expected that the accession of the EU to the Convention may have certain effects. This approach thus requires a comparison of EU law and the Convention, including the case law concerning discrimination on the ground of nationality.

I will discuss which effects follow from the EU's accession to the Convention for a particular fundamental right, i.e., non-discrimination on the ground of nationality in the area of social advantages. The comparison is therefore not a complete one of all cases of discrimination on the ground of nationality, but focuses on those areas where differences can be expected. Thus the central question of this contribution is whether cases of discrimination on the ground of nationality which are allowed under EU law are problematic for the Convention.

Discrimination on the ground of nationality is of special interest, since the EU makes use of the nationality condition in order to define the scope and the contents of several of its instruments, in particular also in relation to social advantages. The application of this condition may be different from that under the Convention and therefore it is worthwhile studying this issue.

Both EU primary and secondary instruments and the ECHR have non-discrimination clauses, but these may have different scopes and interpretations. Moreover, there is a difference from other fundamental rights, which 'double up' in the Treaty and the Convention, such as the prohibition of discrimination on the ground of gender. Therefore the prohibition of discrimination on the ground of nationality deserves special attention. Of course, this prohibition is also relevant in areas other than social advantages,[5] but the topic is of special interest since exactly this area is of a highly politically sensitive nature, because states wish to remain exclusively competent with regard to the organisation of their welfare systems.

It is furthermore useful to keep in mind that the non-discrimination provisions within the EU context differ in several aspects from that in the ECHR context. Within the EU, non-discrimination on the basis of nationality is closely related to the free movement of EU citizens. For these citizens the non-discrimination rule is a fundamental right vis-à-vis another Member State. Secondly, EU law itself distinguishes between EU citizens and non-EU citizens (third-country nationals), although currently some (specific) non-discrimination provisions apply to third-country nationals as well. In the ECHR context the non-discrimination clause is not related to a particular purpose and does not distinguish between categories of citizens.

---

[4] For a more precise description of the liability of Member States under the current law, see also Leonard Besselink, 'The EU and the European Convention of Human Rights after Lisbon: From "Bosphorus" Sovereign Immunity to Full Scrutiny?', SSRN, http://ssrn.com/abstract =1132788 or http://dx.doi.org/10.2139/ssrn.1132788 (last visited 28 April 2015).

[5] The term 'social advantages' is chosen since our topic is not limited to social insurance or social security, but includes all benefits on the basis of whatever instrument or financing method.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Within the ECHR context the prohibition of discrimination on the ground of nationality is – as a fundamental right – a more general concept, and a justification is needed for distinctions between different nationalities to be allowed.

Since the EU instruments can be brought before the European Court of Human Rights after accession, it is interesting to see whether the two different approaches can be reconciled.

In the following sections I will first discuss the case law of the Court of Human Rights (Section II); then I will address the EU provisions and case law (Section III); in Section IV, I will analyse the differences and Section V will provide some conclusions.

II. THE CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS

II.i Introduction: The Applicability of Article 14 to Social Advantages

Article 14 ECHR provides that the enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Thus nationality is a forbidden ground for making a distinction.

Article 14 is not a free-standing provision, but it complements the other substantive provisions of the Convention and the Protocols. Thus it has effect solely in relation to 'the enjoyment of the rights and freedoms' safeguarded by these provisions. Consequently, this provision cannot be applied in any case of alleged discrimination.[6] The Court has consistently held this approach in its case law, e.g. in the *Gaygusuz* judgment.[7] However, the discrimination provision can be applied in social security cases since in the *Gaygusuz* judgment the Court also ruled that a benefit can be within the ambit of Article 1 of the First Protocol, i.e. the protection of property, and thus within the scope of the Convention.[8] Article 1 reads:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

---

[6] Protocol 12 has introduced a more general equality clause. However, few countries have so far ratified it, and it is not a Protocol which is part of the EU accession agreement.

[7] *Gaygusuz v Austria*, 1996-IV 1129. On this judgment, *see* also S van den Bogaerd (ed), *Social Security, Non-discrimination and Property* (Maklu 1997); H Verschueren, 'EC Social Security Coordination Excluding Third-Country Nationals: Still in Line with Fundamental Rights after the Gaygusuz Judgement' [1997] *CMLR* 1991; F Pennings, 'The Potential Consequences of the *Gaygusuz* Judgment' [1999] *EJSS* 181.

[8] The First Protocol is part of the accession agreement.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

The *Gaygusuz* case concerned the refusal of so-called emergency assistance, a kind of Austrian social assistance, to Mr Gaygusuz, on the ground that he did not have Austrian nationality; instead, he had Turkish nationality.

In this judgment the Court required, for the protection of property to be acceptable, that a link could be established between the financing method and the benefit concerned, more specifically that contributions had been paid. In this case the link between the contributions paid and the emergency assistance was an indirect one, but it was considered to be sufficient by the Court. The indirect link was created by the fact that the emergency assistance was payable only after the right to (contributory) unemployment benefit had expired. Therefore, in the Court's view, the emergency benefit was linked to the payment of contributions to the unemployment insurance fund and, as a result, this benefit was within the ambit of the Protocol and, consequently, Article 14 was applicable to this case.

In later cases the Court abandoned the requirement of a link between a benefit and contributions as an accession requirement for Article 14. A landmark decision was the *Stec* judgment,[9] which concerned an issue of discrimination on the ground of gender, but is also relevant to our topic, since its major relevance lay in the Court's new view on the scope of the protection of property. In this judgment, the Grand Chamber accepted that the *Gaygusuz* judgment had caused confusion relating to the criteria which are applicable for income protection and that it was necessary to 'examine afresh' the question whether a claim to a non-contributory welfare benefit should attract the protection of Article 1 of the First Protocol. For this purpose the Court acknowledged that there exists a wide range of social security benefits designed to confer entitlements which arise as of right. Given the variety of funding methods, and the interlocking nature of benefits under most welfare systems, the Court considered that it appears increasingly artificial to hold that only benefits financed by contributions to a specific fund fall within the scope of Article 1 of the First Protocol. In the modern, democratic state, many individuals are, for all or part of their lives, completely dependent for survival on social security and welfare benefits. Many domestic legal systems recognise that such individuals require a degree of certainty and security, and provide for benefits to be paid – subject to the fulfilment of the conditions of eligibility – as of right. Where an individual has *an assertable right under domestic law to a welfare benefit*, the importance of that interest should also be reflected by holding Article 1 of the First Protocol to be applicable.

So this is the new criterion: is there an assertable right to a welfare benefit? If the answer is in the affirmative, Article 14 (the non-discrimination rule) can be applied. However, Article 1 of the First Protocol is not only an admissibility provision, but also has a material content, i.e. the protection of property. I will address this latter dimension in Section II.iii, since some of the issues relating to (indirect) discrimination on the ground of nationality can also be covered by the property protection rules.

Below I will discuss the interpretation of Article 14 and the interpretation of the right to property.

---

[9] *Stec v UK* App nos 65731/01 and 65900/01 (ECHR, 12 April 2006).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

II.ii Article 14 ECHR

II.ii.a Direct discrimination on the ground of nationality

In the already-mentioned *Stec* judgment, the Court considered that Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them; indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article.

Then the Court continued, and used the argument already introduced in the *Gaygusuz* judgment and later judgments, that a difference in treatment is discriminatory, for the purposes of Article 14, if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

It added that Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The scope of this margin will vary according to the circumstances, the subject-matter and the background.[10] A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy. Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international Court to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature's policy choice unless it is 'manifestly without reasonable foundation'.

However, and now the Court comes to an important criterion: *very weighty reasons* would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention.

In the *Gaygusuz* case the Austrian government had submitted that the statutory provision in question was not discriminatory. It argued that the difference in treatment was based on the idea that the state has special responsibility for its own nationals and must take care of them and provide for their essential needs. Moreover, the Unemployment Insurance Act laid down certain exceptions to the nationality condition. Lastly, at the material time, Austria was not bound by any contractual obligation to grant emergency assistance to Turkish nationals.

The Court did not find this argument to be persuasive, now that Mr Gaygusuz was legally resident in Austria and worked there at certain times, paying contributions to the unemployment insurance fund in the same capacity and on the same basis as Austrian nationals. The authorities' refusal to grant him emergency assistance was based exclusively on the fact that he did not have Austrian nationality. Apart from this he was in a like situation to Austrian nationals as regards his entitlement to the emergency benefit. The difference in treatment between Austrians and non-Austrians as regards an entitlement to emergency assistance was thus not based on any 'objective and reasonable justification'.

---

[10] See for example *Petrovic v Austria* 1998-II, § 38, where the authorities' refusal to grant parental leave allowance to a father, on the ground that the allowance was only available to mothers, was not found to have exceeded the margin of appreciation allowed to them.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Another judgment which is relevant to the non-discrimination rule is that of *Koua Poirrez v France*.[11] It concerned a person with Ivory Coast nationality who had been physically disabled since the age of seven and had been adopted by a French national. He was assessed as being 80 per cent disabled. In May 1990 he applied for an allowance for disabled adults. His application was refused on the ground that he was neither a French national nor a national of a country which had entered into a reciprocity agreement with France.

It is interesting that the case was first brought before the *Court of Justice*. In a judgment of 16 December 1992 this Court issued a ruling that the refusal to award the benefit to the applicant was not incompatible with the relevant articles of the EEC Treaty. It pointed out that the applicant's adoptive father could not claim to be a 'migrant worker', which was the category to which the European provisions in question applied, since the applicant's adoptive father, being French, had always lived and worked in France.[12] In doing so, the Court did not examine the question whether the refusal to award the applicant the allowance was, in general, compatible with Community law or not.

In 1998, according to a new Act, the nationality condition was lifted for awards of non-contributory allowances. After several procedures Poirrez was awarded benefit as from June 1998. Now his claim for the preceding period led to a procedure before the Court of Human Rights and a judgment. Before the Court, the government had submitted that the distinction made, prior to the 1998 Act, between nationals and foreigners when awarding the allowance for disabled adults pursued a legitimate aim, which was a balance between the state's welfare income and expenditure. The requirement of proportionality had also been satisfied since foreign nationals had not been deprived of all resources since they were entitled to, among other things, the minimum welfare benefit.

The Court repeated its formula that very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention. In this case the domestic authorities' refusal to award him the allowance in question was based exclusively on the fact that he did not have the requisite nationality. The Court found the arguments advanced by the respondent government unpersuasive. The difference in treatment regarding entitlement to social benefits between French nationals or nationals of a country having signed a reciprocity agreement and other foreign nationals was not based on any 'objective and reasonable justification'.

Finally, also in the *Luczak v Poland* judgment the Court accepted that the direct discrimination which existed in this case was inconsistent with Article 14.[13] The applicant, who was a French national of Polish origin, had moved to Poland in about 1984. After years of employment, he started a farm, but was excluded from the social security scheme for farmers since he did not have Polish nationality.

The government pointed out that the distinction at issue pursued the legitimate aim of protecting a vulnerable group by allowing its members to have access to and benefit

---

[11] *Koua Poirrez v France* App no 40892/98 (ECHR, 30 September 2003).
[12] Case C-206/91 [1992] ECR 6685.
[13] *Luczak v Poland* App No 77782/01 (ECHR, 27 November 2007).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

from the scheme subject to the payment of a modest contribution and the condition of having Polish nationality prior to 2004 and had played a vital role in directing state support to those in particular need. The farmers' scheme was 95 per cent financed from the budget and constituted a heavy burden on taxpayers and the economy alike.

The Court attached importance to the fact that the applicant was permanently resident in Poland, had previously been affiliated to the general social security scheme and had contributed as a taxpayer to the funding of the farmers' scheme. It reiterated that very weighty reasons would have to be put forward by the respondent government in order to justify a difference in treatment based, as in the present case, exclusively on the ground of nationality. The creation of a particular social security scheme for farmers that is heavily subsidised from the public purse could be regarded as pursuing an economic or social strategy falling within the state's margin of appreciation, but legislation regulating access to such a scheme must be compatible with Article 14 of the Convention. Where it is shown that there are reasonable and objective grounds for excluding an individual from the scheme, the principle of proportionality will then come into play. In particular, even where weighty reasons have been advanced for excluding an individual from the scheme, such exclusion must not leave him in a situation in which he is denied any social insurance cover, whether under a general or a specific scheme, thus posing a threat to his livelihood. Indeed, to leave an employed or self-employed person bereft of any social security cover would be incompatible with current trends in social security legislation in Europe. The Court also noted that the government argued that the difference in treatment at issue was justified by the social and economic policies pursued prior to 2004, when Poland was obliged to change the relevant law following its accession to the European Union. The government had not however explained, the Court remarked, why its public policy goals in respect of the farmers' scheme suddenly lost their relevance after 2004. The Court concluded by saying that the government had not provided any convincing explanation of how the general interest was served by refusing the applicant's admission to the farmers' scheme during the period in question.

It has been argued that the *Moustaquim* case[14] could be an argument that the Court of Human Rights will not consider preferential treatment for EU nationals to be contrary to the Convention. This case concerned a Moroccan man who had been deported from Belgium, who then stayed for a couple of years in Sweden, and who wished to have the deportation order revoked. In this case the Court ruled that there is an objective and reasonable justification for the refusal as Belgium belongs, together with those states, to a special legal order. In this case the right to enter and stay in the country was at stake, which is very different from the area of social security, since it is generally accepted that the right to equal treatment does not concern the right to enter a particular country.[15] As far as social security is concerned, the issue of equal treatment only arises after a person has the right to stay legally in a country. Or, in other words, differences on ground of nationality can still be allowed in conditions for

[14] *Moustaquim* App no 12313/86 (ECHR, 18 February 1991).

[15] Relevant also is that Protocol 4 to the Convention itself makes a difference as far as nationality is concerned, since persons having the nationality of a country cannot be expelled from that country.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

access to the country, but claiming social advantages is a second stage, where there have to be very weighty reasons for unequal treatment. Therefore, from this judgment we cannot derive that a difference between third-country nationals and EU nationals is generally allowed, although it is certainly not impossible that the EU context may be, in particular circumstances, a justification for making distinctions, provided they constitute *very weighty reasons*.

Conclusion. The Court decided that very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality (i.e. direct discrimination) as being compatible with the Convention. Even if EU law does not require Member States to treat third-country nationals equally with nationals, this may be required on the basis of the Convention (*Gaygusuz*, *Poirrez*). And even if EU law can explain why persons are excluded, or have to be included, that is not decisive (*Luczak*). Despite the room for states to have margins of appreciation to have a particular policy or scheme, for limiting *access* to the scheme on the ground of nationality the criterion of very weighty reasons applies.

II.ii.b Indirect discrimination

In its case law, the Court of Human Rights has not (yet) developed a concept of *indirect* discrimination, a concept which is so well known from the Court of Justice's case law and which is now also laid down in EU instruments. For instance, in terms of the Directive on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation,[16] indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice disadvantages a substantially higher proportion of the members of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary (Article 2(1)(b)). An obvious example of indirect discrimination on the ground of nationality is a residence condition, e.g. for receiving a benefit, since this will normally affect foreigners more than nationals, and it will be more often the case that foreigners do not live in the state where they work. So this is the approach within EU law.

The *LB v Austria* judgment of the Court of Human Rights shows that this Court is not so sensitive to rules with discriminatory effects which are not directly discriminatory. The case was that of an Austrian national of Hungarian origin who complained that the Austrian authorities had refused to allow him to pay contributions for the time that he had been in school and studied in Hungary. The Court did not accept that the difference in treatment was based on national origin. It considered that the legislation in question did not distinguish on the basis of nationality and found that making participation in an insurance scheme dependent on employment in a specific country was not unreasonable or arbitrary.[17]

If a distinction is made that does not constitute direct discrimination on the ground of nationality or one of the other mentioned grounds, this can also be assessed on a

[16] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006, [2006] OJ L 204, 23.

[17] *LB v Austria* App no 39802/98 (ECHR, 18 April 2002).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

ground other than nationality, since Article 14 not only mentions specific forbidden grounds, but also prohibits discrimination due to 'other status'.[18]

A recent case where this clause was applied to a situation where residence conditions were disputed is the *Carson* case.[19] The case concerned 13 pensioners who had often spent long periods of their working life in the UK (during which they had paid social security contributions), before emigrating to another country (outside the EU), i.e. South Africa and Canada. After having become entitled to their pension, the pension was no longer upgraded if they left the UK, and therefore it became considerably lower than if it had benefited from upgrading. The Act required the upgrading to maintain its value 'in relation to the general level of prices obtaining in Great Britain'. For non-residents there was no such upgrading, unless they lived in a country with a bilateral reciprocal social security agreement with the UK.

The Court considered that it had established in its case law that only differences in treatment based on an identifiable characteristic, or 'status', are capable of amounting to discrimination within the meaning of Article 14,[20] and there must be a difference in the treatment of persons in analogous, or relevantly similar, situations.[21] Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. A wide margin is usually allowed to the state under the Convention when it comes to general measures of economic or social strategy.

The Court was not concerned, it continued, with an assessment of the effects, if any, on the many thousands in the same position as the applicants, but its role is to determine the question of principle, namely whether the legislation as such unlawfully discriminates between persons who are in an analogous situation.

The Court then had to decide whether a distinction on the ground of residence could fall under the ground 'or any other status'. The words 'other status' have a wide meaning so as to include, in certain circumstances, a distinction which is made on the basis of the place of residence. The second question was whether the applicants were in a relevantly similar position to pensioners receiving up-rating. As the Court has established in its case law, in order for an issue to arise under Article 14, the first condition is that there must be a difference in the treatment of persons in relevantly similar situations. The applicants' principal argument in support of their claim to be in a relevantly similar situation to pensioners who receive up-rating was that they had also worked in the United Kingdom and had paid compulsory contributions to the National

---

[18] M Cousins, *The European Convention on Human Rights and Social Security Law* (Intersentia 2008) 67.

[19] *Carson v United Kingdom* (2009) 48 EHRR 41. See also M Cousins, 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?' (2009) 16 *Journal of Social Security Law* 118 ff.

[20] *Kjeldsen, Busk Madsen and Pedersen* App nos 5095/71 and 5920/71 (ECHR, 7 December 1976).

[21] *DH and Others v the Czech Republic* App no 57325/00(ECHR, 7 February 2007); *Burden v the United Kingdom* App no 57325/00 (ECHR, 13 November 2007).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Insurance Fund. The Court considered, however, that unlike private pension schemes, where contributions are paid into a specific fund and where those contributions are directly linked to the expected benefit returns, National Insurance contributions have no exclusive link to retirement pensions. It is impossible to isolate the payment of National Insurance contributions as a sufficient ground for equating the position of pensioners who receive up-rating and those, like the applicants, who do not. The payment of National Insurance contributions alone was insufficient to place the applicants in a relevantly similar position to all other pensioners, regardless of their country of residence. Given that the pension system is primarily designed to serve the needs of those who are resident in the United Kingdom, it was difficult to draw any genuine comparison with the position of pensioners living elsewhere, because of the range of economic and social variables which apply from country to country. Neither did the Court consider that the applicants were in a relevantly similar position to pensioners living in countries with which the United Kingdom has concluded a bilateral agreement providing for up-rating. Such treaties are entered into on the basis of judgments by both parties as to their respective interests and may depend on various factors. Where an agreement is in place, the flow of funds may differ depending on the level of each country's benefits and the number of people going in each direction. It follows that there had been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No 1.

Thus, the Court of Human Rights does not apply a concept of indirect discrimination in its case law. Instead, it considers whether the disputed ground itself is a form of direct discrimination. In respect of discrimination on such grounds, which are not sex or nationality, the Court gives ample room for a margin of appreciation for the state and therefore such cases are not successful for the applicant.

This approach is also followed in later case law. In the *Efe v Austria* judgment[22] the Court held that the applicant was not in a relevantly similar position as Austrian residents. His children lived outside Austria and the position of Austrians was that their children live in Austria, the Court considered. It did not have a feel for the indirect discrimination approach that such a rule affects mainly foreigners. In other words, the issue remains approached within the direct discrimination test. Therefore refusal of family allowances for children residing outside Austria was not contrary to Article 14.

In *Pichkur v Ukraine*[23] the Court followed the same approach, but the outcome was different. Benefit was refused since the applicant did not reside in Ukraine, from which country the benefit was claimed. On the basis of the direct discrimination test the Court now assumed discrimination.

It considered that in the *Carson* judgment the pensioners outside the UK were not in an equal position to those in the UK. It is difficult to draw any genuine comparison between the pensioners within the country and those living elsewhere, because of the range of economic and social variables which apply from country to country. This may be relevant for indexation. Thus the compared positions were not equal.

In *Pichkur* the person concerned had acquired a pension, and the only reason that it was not paid was that he was not living in the country. This was a comparable situation,

[22] *Efe v Austria* App no 9134/06 9 (ECHR, 8 January 2013).
[23] *Pichkur v Ukraine* App no 10441/06 (ECHR, 7 November 2013).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

according to the Court. The country can still mention justifications for refusing benefit, but had not done so in this case.

So the approach of the Courts is different. The Court of Human Rights applies the direct discrimination test, in this case on the ground of residence. This ground applies only in the case of persons in relevantly similar positions. Therefore the residence issue is not treated as a form of indirect discrimination on the ground of nationality (fortunate for Pichkur, who did not have a foreign nationality).

In the Court of Justice case law residence is not a general ground on which no discrimination must take place, although there are several provisions in coordination rules that prohibit residence conditions, but only for the benefits mentioned in those provisions. A residence condition in other benefit schemes has to be approached by the indirect discrimination test.[24]

II.iii The Right to Property

In Section II.i Article 1 of Protocol No 1 on the right to property was mentioned as a possible way to address issues of (in)direct discrimination.

The Court of Human Rights approaches this article as follows. Article 1 of Protocol No 1 does not include a right to acquire property. It places no restriction on the Contracting State's freedom to decide whether or not to have in place any form of social security scheme, or to choose the type or amount of benefits to be provided under any such scheme. If, however, a state has legislation in force which provides for the payment, as of right, of a welfare benefit, that legislation must be regarded as generating a proprietary interest falling within the ambit of Article 1 of Protocol No 1 for persons satisfying its requirements.[25]

So far, invoking the right to property protection has led to little success in the area of social security. An example where there was a positive result for the applicant was the *Ásmundsson* judgment. This concerned a person in Iceland who had become fully disabled in 1978 as a seafarer and became entitled to disability benefit. A 200 kg boulder had fallen on his leg. After his accident the applicant joined a transport company, Samskip Ltd, as an office assistant, and became employed there as head of the claims department. In 1992, new legislation changed the way the applicant's disability was assessed for the purposes of his pension, so that it was to be based not on his inability to perform the same work, but work in general. Under the new rules, the applicant's disability was reassessed and his loss of capacity for work in general was found to be 25 per cent; this was below the minimum level of 35 per cent which was the accession requirement and therefore his benefit entitlement was terminated.

Of the 336 reassessments the disability pension of 104 persons was changed and 104 pensioners lost their pension altogether. Thus the measure affected the applicant in a particularly harsh manner, the Court considered, in that it totally deprived him of the disability pension he had been receiving on a regular basis for nearly 20 years and which, at the time, constituted one-third of his gross monthly income.

---

[24] See also Chapter 3 in this volume.

[25] *Kopecky v Slovakia*, 2004-IX § 35.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Against that background, the Court found that the applicant was made to bear an *excessive and disproportionate burden* which could not be justified by legitimate community interests relied upon by the authorities. It would have been otherwise had the applicant been obliged to endure a reasonable and commensurate reduction rather than the total deprivation of his entitlements.

One can have some doubts as to this approach, since it is very possible that the fact that the benefits of a small group are affected is, from a policy point of view, a justified outcome. After all, Ásmundsson could still earn a considerable income alongside his benefit. In addition, one may wonder why it is decisive, from the perspective of property protection, whether only a very small group loses all entitlement.

It seems that the Court's approach can be explained as a typical human rights perspective – 'is the outcome problematic in an individual case?' – rather than developing consistent criteria for when the infringement of benefit rights is allowed and when it is not.

This impression also appears from the *Moskal* judgment,[26] which concerned a Polish woman who had received a Polish early retirement benefit since her son suffered from, inter alia, asthma, and therefore needed a lot of care. About 10 months later the benefit administration decided to terminate the benefit, since it now doubted whether the medical situation of the child indeed required permanent care. The Court considered that the total loss of benefit was too abrupt, and that the new benefit to which she would be entitled would be much lower. For this reason the Court decided that a fair balance between the requirements of the general interest and those of the protection of the fundamental rights of the individual were lacking and that Article 1 of the Protocol had therefore been infringed.

This means that stopping the payment of a benefit that is not needed is seen as an infringement of the right to property. However, we can hardly expect that this is the case in any instance of such payment that is not due; any general rules are lacking on this, however. Thus the Court is more focused on the individual situation than on making a more general rule on when and under which circumstances the withdrawal of a benefit is allowed.

In other cases, the Court has not held a general recourse to property protection to be successful. An example was the *Valkov* judgment,[27] concerning the capping of pensions in Bulgaria (a pension was not paid for the amount exceeding a ceiling). As a result these persons were in some cases not paid two-thirds of their pension; the remaining pension was quite low (€81 a month in the case of Valkov). The *Ásmundsson* criteria might have led to the conclusion that their property rights had been infringed: the loss of pension rights was a major loss and the rule affected a small number of pensioners only. However, their claim was dismissed: they had not lost their full pension and they belonged to the 'top earners' among pensioners.

So the outcome in their individual situation – these were not really poor people – was considered more relevant than a consistent application of certain criteria. After all, unlike Mr Ásmundsson, the pensioners had no other income; compared to other

[26] *Moskal* App no 10373/05 (ECHR, 15 September 2009).
[27] *Valkov* App nos 2033/04, 19125/04, 19475/04 (ECHR, 25 October 2011).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

pensioners they had relatively high incomes, but this was indeed relative, since the pensions were so extremely low!

Easier to understand is the argument also mentioned by the Court that the measure was a transitional measure, in view of Bulgaria's transition to a market economy.

Conclusions. The protection of property is not directly linked to discrimination on the ground of nationality, although if a benefit is withdrawn or reduced it may be indirectly concerned with nationality, e.g. because of residence. The protection of property only provides protection in case of withdrawal of benefits provided that the measure cannot objectively be justified and the applicant is made to bear an *excessive and disproportionate burden* which could not be justified by the legitimate community interests relied on by the authorities.

III. THE PLACE AND APPLICABILITY OF THE NON-DISCRIMINATION RULES IN EU LAW

III.i Introduction

In the Treaty on the Functioning of the EU (TFEU) and its predecessors, the prohibition of non-discrimination on the basis of nationality is a fundamental principle laid down in Article 18 TFEU and Article 45 TFEU.

III.ii Direct Discrimination against EU Nationals

III.ii.a Workers

Article 45 TFEU ensures the free movement of workers and non-discrimination in the area of working conditions. Restrictions are only allowed if these can be justified on the basis of public order, public safety or public health. Article 45 also prohibits indirect discrimination.

In the area of statutory social security, Regulation 883/2004 prohibits non-discrimination on the ground of nationality. Social assistance does not fall within the scope of the regulation and the regulation is restricted to traditional forms of social security, including unemployment benefit, an old-age pension, sickness benefit, survivors' benefits, and family allowances. Advantages such as study grants and housing benefits are thus not covered.

With respect to social advantages not within the scope of Regulation 883/2004, another regulation may be relevant, i.e. Regulation 492/2011, which prohibits all discrimination on the ground of nationality for workers (with EU nationality). The objective justifications in case of discrimination are limited: public order and public health, and these have consistently been given a narrow interpretation by the Court of Justice.

For non-workers Article 18 TFEU is relevant as it reads that within the scope of application of the Treaties, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. In connection with the provision on European citizenship, Article 21 TFEU, Article 18 can be invoked by all EU citizens.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

III.ii.b EU citizens

Invoking Article 18 TFEU is possible on the basis of the provisions on European citizenship, Articles 20 and 21 TFEU. Before discussing this, it is important to point out the priority order. If Article 45 TFEU is applicable, Article 21 is not applicable. This is important as the application of Articles 18 and 45 may have different outcomes.

Article 18 TFEU provides that within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.

In the *Martínez Sala* judgment,[28] a landmark decision, the combination of these provisions led to an interesting outcome: a person who was no longer employed could invoke a non-discrimination rule, i.e. the predecessor of Article 18 (thus far, only employees and self-employed could do so), when she was refused child-raising benefit. The Court argued that Article 21 TFEU attaches to the status of a citizen of the Union the rights and duties laid down by the Treaty, including the right, laid down in Article 18 TFEU, not to suffer discrimination on grounds of nationality within the material scope of the Treaty.

Also in the *Grzelczyk* judgment Articles 18 and 21 TFEU (the present numbering) were relevant.[29] The Court of Justice considered that discrimination solely on the ground of nationality is in principle prohibited by Article 18 TFEU.

Article 21 TFEU indeed has important effects. Whereas a Member State was previously required to assume full social responsibility and provide welfare for those who had already entered its employment market and who thus made some contribution to its economy, such financial solidarity is now in principle to be extended to all Union citizens lawfully resident on its territory. Yet it should be noted that certain limits remain. As regards assistance covering the maintenance costs of students, the Court accepted in the *Bidar* judgment[30] that Member States are permitted to ensure that the granting of social assistance does not become an unreasonable burden upon them and that the granting of such assistance may be limited to students who have demonstrated 'a certain degree of integration'. This was further elaborated in the *Förster* judgment.[31] Jacqueline Förster, a German national, was confronted with the Dutch rule that study finance may be granted to students who are nationals of a Member State if, prior to the application, they have been lawfully resident in the Netherlands for an uninterrupted period of at least five years. The Court investigated whether such a requirement can be justified by the objective of the host state's policy of ensuring that students who are nationals of other Member States have, to a certain degree, integrated into its society. The Court decided that this condition is appropriate for the purpose of guaranteeing that the applicant is integrated into the society of the host state.

Thus, Article 18 in conjunction with Article 21 does not remove all discrimination on the basis of nationality; instead, Member States may require a certain degree of integration by a claimant into their society before this article can be invoked. Five years is considered to be a period which is proportional.

---

28 Case 85/96 [1998] ECR I-2691.
29 Case 184/99 [2001] ECR I-6193.
30 Case C-209/03 [2005] ECR I-2119.
31 Case C-158/07 *Jacqueline Förster* [2008] ECR I-8507.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

In the Charter of Fundamental Rights of the European Union the non-discrimination principle is also mentioned (Article 21). This provision is elaborated in the provisions mentioned in this section.

Conclusions. Direct discrimination on the ground of nationality is not allowed under EU law for economically active persons apart from very limited exceptions. Also for EU citizens, protection against discrimination on the ground of nationality will apply. These rules apply to EU nationals only.

III.iii Indirect Discrimination against Workers

An example of the application of the prohibition of indirect discrimination can be seen in the *Pinna* case,[32] where the Court decided that the coordination regulation for social security[33] was not allowed to provide that persons employed in France received family benefits at the level of the state of residence. As a result, persons employed in France received for their children residing, for example, in Greece, child benefit in accordance with the Greek rules, which meant a lower benefit. The Court considered that the principle of equal treatment prohibits not only overt discrimination based on nationality, but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result.

Under EU law in case of a distinction which raises a suspicion of indirect discrimination an objective justification is possible. Consequently, indirect discrimination is not generally forbidden. Indirect discrimination occurs, in the area of nationality, in particular as a result of residence conditions. Residence conditions generally affect larger numbers of persons with a nationality other than that of the state which imposes this condition. Also the regulation itself has examples of residence conditions and these may be reconsidered. Generally under EU law residence conditions are forbidden, and objective justifications relating to costs, administrative problems, comparisons between national workers and foreign workers and population policy are not accepted.

A major case in which the Court did *not* decide that a discriminatory rule under the regulation was inconsistent with the Treaty concerned unemployment benefit for wholly unemployed frontier workers. Wholly unemployed frontier workers are subject to the legislation on unemployment benefits in their country of residence, even if they seek work in the country of their last employment in addition to seeking work in the state of residence. For frontier workers wishing to be available to the employment services in the state of employment, this rule is unsatisfactory, as it implies that they are deprived of the rights they acquired by virtue of the legislation of the state of employment. In the *Mouthaan* judgment[34] the Court held that the rule was not inconsistent with the Treaty. The Court accepted (actually: it itself invented) an objective justification: since frontier workers have better opportunities on the labour market in their country of residence it was permissible to determine that their unemployment benefits are also according to the legislation of this country.

---

[32] Case 41/84 [1986] ECR 1.
[33] Article 73(2) of Regulation 1408/71.
[34] Case 39/76 [1976] ECR 1901.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Conclusions. In case of indirect discrimination, objective justifications are allowed, though reasons only qualify as such if they meet the conditions set by the Court. However, such cases may imply a loss of benefit rights, and thus an infringement of the protection of property.

III.iv Discrimination against Third-country Nationals

The provisions concerning non-discrimination in Articles 18 and 45 TFEU can be invoked by EU nationals only. For Article 45, this is the result of the fact that Article 45 is part of the section on the free movement of persons, which is one of the fundamental freedoms essential to the EU, and therefore for workers with the nationality of an EU Member State. Also the scope of Article 18 TFEU is limited to EU citizens.

As we have seen in the description of the European Court of Human Rights' case law, there are several cases where a person in an EU Member State was excluded from a particular benefit, whereas at the material time of the case recourse to EU law was not successful (e.g. in the case of *Gaygusuz*).

Let us first consider the current EU law. Also at present the nationality condition is essential for being covered by the coordination regulation for social security for migrant workers (Regulation 883/2004). This regulation contains an important non-discrimination rule in the area of statutory social security (social assistance benefit is excluded from the material scope). Thus this rule prohibits different treatment for EU nationals (and EEA and Swiss nationals). As a result a third-country national cannot invoke this rule to combat discrimination on the ground of nationality.

This nationality condition has been severely criticised for excluding third-country nationals. A major point of discussion was whether Article 42 EC (now Article 48 TFEU) could be a suitable legal basis for an extension of the coordination regulation to third-country nationals. This issue was solved by the Court of Justice in the *Khalil* judgment.[35] From this judgment it follows that Article 48 TFEU cannot be a legal basis for extending the personal scope to third-country nationals, since the Court decided that the scope of this article is limited to EU nationals. Only they enjoy the freedom of movement guaranteed by the Treaty.

The Court made an exception for stateless persons and political refugees, which were the appellants in this case. They could rely on the regulation, since they were mentioned in the regulation and because of the UN conventions on stateless persons and refugees this (limited) extension was allowed. The appellants applied for child benefit in Germany, which was refused to foreigners who did not have a residence entitlement or residence permit. Those involved were, among others, Kurdish and Palestinian refugees from Lebanon, who had already lived for 10 years in Germany when they were confronted with this law. However, although they were within the personal scope of the regulation, their claim was still not successful. This was because the Court referred to its case law, the *Petit* judgment in particular,[36] in which it concluded that Article 51 EC Treaty (now Article 48 TFEU) and Regulation 1408/71 do not apply to situations which are confined within a single Member State. This is in

[35] Case 95/99 [2001] ECR I-7413.
[36] Case 153/91 [1992] ECR I-4973.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

particular the case where the situation of a worker has factors linking it solely with a non-member country and one single Member State. Consequently, the refugees and the stateless persons in this case could not rely on the rights conferred by the regulation now that they were in a situation which was confined in all respects within one Member State. This means that stateless persons and refugees can benefit from this decision only when their situation involves two Member States.

The European Commission thereby made a new proposal, this time based on Article 63(4) EC (now Article 79 TFEU). This article concerns the conditions for the admission and residence of third-country nationals to the Community. This legal basis for making a regulation was accepted by the Council and in 2003 Regulation 859/2003 was adopted.[37] This regulation meant that third-county nationals can, under certain conditions specified below, invoke the non-discrimination rule. When Regulation 883/2004 was adopted a new regulation on third-county nationals was necessary; after long and intensive discussions this was adopted, i.e. Regulation 1231/2010.[38]

Both regulations provide that the coordination regulation shall apply to nationals of third countries who are not already covered by those regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are *in a situation which is not confined in all respects within a single Member State*. The italicised condition is of decisive importance since it means that the regulation can only be applicable if a situation concerns facts in at least two Member States (e.g. a worker from France who goes to work in the Netherlands). If, however, a person has come from a non-EU state and has remained in one and the same EU Member State, then the regulation is not applicable.[39] Therefore the non-discrimination rule is still of limited value for third-country nationals. In other words, they can still be discriminated against without the possibility of invoking an EU non-discrimination rule.

Conclusions. For third-country nationals, invoking EU law is limited. For the coordination regulation an opening has been made, since invoking the regulation is possible if the facts of the case are not limited to one Member State. For other instruments the exclusion is still absolute.

IV. COMPARISON OF THE EU AND ECHR APPROACHES

IV.i The Prohibition of Direct Discrimination

In the case of direct discrimination against persons with EU nationality the approach of EU law and the Convention do not differ significantly. The European Court of Human

[37] [2003] OJ L 124 1. See the preparatory work in [2002] Com 59.

[38] [2010] OJ L 344 1.

[39] An interesting question is what the position of Denmark, the UK and Ireland is in this respect. It is clear, of course, that a third-country national cannot invoke the regulation if s/he first works in Belgium and then moves to Denmark, in order to have periods of insurance aggregated. However, what about the reverse situation? If s/he moves to Belgium, can s/he have his or her Danish periods added to the Belgian ones?

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Rights requires that there must be 'very weighty' reasons to justify discrimination, whereas under EU law there is a specified number of exceptions to the prohibition of discrimination. We may assume that these terms will largely overlap, although the EU grounds are more specific.

Still, in terms of scope, the approach to discrimination differs considerably. This has to do, in large part, with the framework within which the discrimination terms occur. For the EU the non-discrimination rule is basically linked to free movement, i.e. initially of EU workers and the self-employed. As of 2010 this has been extended in the area of statutory social security to the free movement of persons, active or inactive, but still to EU citizens only.

Article 18 TFEU is also of use, in that it removes nationality conditions for benefits not within the scope of Regulation 883/2004, for instance for social assistance. This is relevant for those who are not workers.

In these cases there is, in the Court's case law, more room for an objective justification than in the case of the regulations. In the *Förster* judgment,[40] the Court decided that the condition that the applicant must have a certain degree of integration into the society of the host state is acceptable as an objective justification for a residence condition. This condition must be well reasoned, adequate and proportional.

There is, as yet, no comparable European Court of Human Rights case law. Since the condition which was applicable in *Förster* was applied to foreigners only, it is a form of direct discrimination, and thus would require very weighty reasons had it been a case before the European Court of Human Rights. How this Court would decide the case is still not clear.

The criteria and arguments of the Court of Justice are well founded and satisfy the proportionality criterion. Still, the criterion of the degree of integration applies to foreigners only (and not to persons with the nationality of the host state); thus the distinction that is made between economically active persons and others is different from the European Court of Human Rights' case law so far. Whether these constitute 'very weighty' reasons remains to be seen.

Another distinction is between EU nationals and non-EU nationals. We have seen that gradually the scope of the non-discrimination rule has been extended to non-EU nationals, but only if the facts of the case are not restricted to one Member State (in statutory social security), or depending on whether there is an agreement. The condition that the facts must not be restricted to one Member State also applies for EU nationals, but for the latter it is much easier to satisfy this condition. It can therefore be disputed whether the criterion for third-country nationals is a very weighty reason. I will discuss this in the next section. In other areas (Article 18 TFEU) the exclusion of third-country nationals is an absolute one.

IV.ii Can the ECHR Lead to Different Outcomes?

Can cases of direct discrimination which do not fall under EU law or which are still allowed by EU law be addressed by the Convention?

---

[40] Case C-158/07 *Jacqueline Förster* [2008] ECR I-8507.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

If we look again at the *Gaygusuz* case, it has to be noted that EU law has changed to the extent that a regulation on third-country nationals (Regulation 1231/2010) has been adopted, which did not exist at the time of the *Gaygusuz* decision. This regulation extends the non-discrimination provision of the coordination regulation to third-country nationals such as Mr Gaygusuz. A particular problem, however, is that this emergency assistance is probably a form of social assistance and is thus excluded from the scope of the coordination regulation.

However, and this is of more general importance, the mentioned regulation only applies if not all the facts of the case are limited to one Member State. Even if this emergency benefit is within the scope of the regulation, Mr Gaygusuz could not contest his exclusion from the benefit by means of the Regulation 1231/2010 either.

Also the EU citizens' provision (Article 18 TFEU) is limited to EU nationals. Mr Gaygusuz could not invoke this rule successfully either. Therefore, invoking the Convention is still necessary for Mr Gaygusuz if benefit is refused on the ground of nationality.[41]

Therefore, the very limitation of the equal treatment rules to EU nationals constitutes a form of discrimination which may be tested against the Convention. As we saw, in respect of statutory social security this discrimination has been lifted to a considerable extent, the main difference being that the situation must not be limited to one Member State.

Are there weighty reasons for this difference? The rule that the coordination regulation is only applicable if the facts of the case are not limited to one Member State was established in the *Petit* judgment.[42] In this case an employee was confronted with conditions on the use of language to be used in legal procedures in Belgium. The Belgian law on languages to be used in legal proceedings prescribed the Dutch language in a case like this. The use of another language would make the case of the person concerned inadmissible. When Mr Petit challenged this it was considered that he had Belgian nationality and had never been employed in a state other than Belgium. The Court of Justice decided that the rules of the Treaty ensuring the free movement of workers and the coordination regulation were not applicable to activities all elements of which are restricted to the territory of a single Member State only. This criterion was also at stake in the *Government of the French Community and Walloon Government v Flemish Government* judgment.[43]

In the *Khalil* case[44] (see Section III.iv) the Court reiterated this condition and Regulation 1231/2010 has reproduced it. This means that only if a situation concerns

---

[41] Decision 3/80 of the Association Council will provide the same result since this decision has the same material scope as the coordination regulation. The Decision will be beneficial for other types of benefits, but for Turkish nationals only. So for other third-country nationals linked to one Member State only, the Convention provides a result which is different from EU law.

[42] Case 153/91 [1992] ECR I-4973.

[43] Case C-212/06 [2008] ECR I-1683. See on this judgment also H Verschueren, 'De regionalisering van de sociale zekerheid in België in het licht van het arrest van het Europese Hof van Justitie inzake de Vlaamse zorgverzekering' (2008) 2 *Belgisch Tijdschrift Sociale Zekerheid* 177–232; I van der Steen, 'Zuivere interne situaties: geen omwenteling, wel inperking' (2008) 11 *NTER* 301 ff.

[44] Case 95/99 [2001] ECR I-7413.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

facts in at least two Member States (e.g. a worker from France who goes to work in the UK) is the regulation applicable. If, however, a person has come from a non-EU state and has remained in one and the same EU Member State, then the regulation is not applicable. This limitation can also be found in the *Khalil* judgment, and earlier in the *Petit* judgment. Still, this limitation could be criticised, as, unlike these two cases, the regulation on third-country nationals is not based on Article 48 TFEU, but on Article 63(4) EC. This separate legal basis is not related to the right to free movement, which is indeed related to the economic freedoms established within the EU. Therefore the question arises why at least the facts of two Member States have to be involved.

For third-country nationals the effect of this requirement differs from that for EU nationals, such as Mr Petit in the *Petit* judgment,[45] as the former persons are from a third country and are therefore much more likely to be discriminated against on grounds of nationality. The third-country nationals cannot, as a result of the condition that two Member States must be involved, invoke the regulation in, for instance, a case of discrimination on grounds of nationality which occurs within a Member State if they do not work, reside or stay in another Member State. One can therefore doubt whether the difference within this EU instrument constitutes a weighty reason for making a distinction.[46]

Regulation 1231/2010 would probably not be of help in the *Poirrez* case either. In respect of the father it was argued that he was not a migrant worker. Under the new formula one would say that the facts of the case did not involve two Member States. Thus neither the father nor the son could invoke the regulation.

The Polish case of *Luczak v Poland* would, of course, lead to a different outcome now that Poland is a member of the EU. The Court seemed to tease the Polish government by saying that it had not explained why its public policy goals in respect of the farmers' scheme suddenly lost their relevance after 2004, since the answer is obvious: Poland was no longer allowed to make this distinction towards other EU nationals after it acceded to the EU. However, this remark is still relevant to us, since it shows that EU membership itself is no longer a self-evident ground, at least for the European Court of Human Rights, for making or not making differences.

Regulation 1231/2010 is relevant only to benefits within the scope of this regulation. Discrimination occurring in areas not covered by this regulation can be combated by means of Regulation 492/2011 or Article 18 TFEU (in combination with EU citizenship). The personal scope of both instruments is limited to EU nationals. Also here one can doubt whether this is consistent with the Convention. Are there very weighty reasons to exclude third-country nationals (who are legally staying in a Member State) from invoking EU law rules? As we saw in respect of the coordination regulation, there was a great deal of doubt as to whether this regulation could be based on Article 48. Only after the Court of Justice decided that in view of the place of the legal basis for

[45] Case 153/91 [1992] ECR I-4973.

[46] Some Member States can exempt themselves from the Regulation: Denmark, the UK and Ireland. We will not go into this issue too deeply here, but it is doubted whether these states can now refuse to apply the equal treatment principle if the Union is bound by the Convention. As a result the non-discrimination law will also affect their reservations to the Regulation.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

the regulation in the Treaty (i.e. in the chapter on free movement, a freedom created for EU nationals) did it decide that third-country nationals could not be involved.

This argument need not constitute, in itself, a very weighty reason, and it is certainly not sufficient to justify any form of discrimination. Therefore we may expect that when third-country nationals wish to invoke EU rules and are refused on the basis of nationality, the Convention may provide an instrument to fight this discrimination successfully.

IV.iii Residence Conditions

There are some residence conditions that are accepted in the coordination regulation, for instance in the case of wholly unemployed frontier workers. As we have seen, the justification for this residence condition lies in the fact that frontier workers have a better position on the labour market in the country where they reside.

The Court of Human Rights does not apply a concept of indirect discrimination. Therefore it is unlikely that it will consider the coordination rule to be contrary to the prohibition of discrimination on the ground of nationality. In cases of residence conditions the Court of Human Rights compares the situation of persons claiming that they are treated differently from other persons, e.g. the position of persons whose pensions are upgraded and that of those whose pensions are not upgraded. This comparison is quite complicated and has thus far not led to positive results for the persons concerned in residence cases. It is not likely that the Court of Human Rights would come to the conclusion, in the (rare) cases where the Court of Justice has accepted residence conditions, that these would infringe Article 14 ECHR, because of the reticence of the Court of Human Rights to award the claims of appellants and also because the Court of Justice mentions elaborated grounds of justification. If such a case were to reach the Court of Human Rights, however, it would have to assess the objective justification given by the Court of Justice, and this might influence the way it constructed its argument.

The use of these objective justifications made by the Court of Justice seems to be more satisfactory in cases of indirect discrimination (in any case when residence conditions are concerned), than the use of a comparison of situations, which is performed by the European Court of Human Rights. First of all, as a general problem it is often difficult to compare situations since it is difficult to know which elements have to be taken into account. The *Carson* situation clearly shows these problems. Secondly, is it not *because* it is indirect discrimination rather than direct discrimination that situations are difficult to compare? In other words, should we not use a different instrument? This is not unimportant, since the British rules had a large negative effect on the pensions in *Carson*. A well-elaborated justification that there is no infringement of the discrimination rules is desirable.

Whether the accession of the EU to the ECHR will lead to changes in views by the European Court of Human Rights on the way discrimination cases have to be dealt with is uncertain at this moment in time. Given the differences in approaches such changes could be possible and would even be desirable if such effects were to occur.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

IV.iv Protection of Property

Protection of property in social security is not an issue regulated by EU law as such. The protection of property is mentioned in the Charter of Fundamental Rights of the EU (Article 17), but so far it has not been interpreted as pertaining to social security.

In some cases before the Court of Justice, however, the principle of the protection of property was invoked vis-à-vis social security, and therefore it is interesting to compare the Court's approach with that of the Court of Human Rights. The *Testa* case[47] involved the rule that an unemployed person can seek work abroad (while remaining in receipt of unemployment benefit) for three months. However, if he returns too late he loses all remaining benefit rights. Thus the EU rules deprive him of benefit rights acquired on the basis of national legislation. The effects of a late return can thus be quite harsh, depending on the duration of the benefit entitlement involved.

The Court discussed – in answer to the national court's questions – whether the disputed article (Article 69(2) of the then coordination regulation) infringed the fundamental rights guaranteed in this manner by Community law, i.e. Article 14 of the German Basic Law with regard to the protection of the right to property. Although the property protection rule was at stake, no reference was made to the ECHR.

The Court considered that the question of a possible infringement of fundamental rights by a measure of the Community institutions can only be judged in the light of Community law itself, since fundamental rights form an integral part of the general principles of the law, the observance of which it ensures. One of the fundamental rights which is accordingly protected under Community law in accordance with the constitutional concepts common to the Member States and in the light of international treaties for the protection of human rights is the right to property.

In order to determine whether Article 69(2) might infringe the fundamental rights guaranteed in this manner by Community law, consideration should first be given to the fact that the system set up by this article is an optional right, which applies only to the extent to which such an application is requested by a worker, who thereby forgoes his right of recourse to the general system. The consequences are made known to the worker.

The penalty under Article 69(2) must likewise be judged in the light of the advantage of a worker per Article 69(1), which has no equivalent in national law. Moreover, in exceptional cases the three-month period may be extended. This ensures that the application of Article 69(2) does not give rise to disproportional results.[48] Therefore the Court accepted an objective justification for the radical loss of benefit rights.

The test of the Court of Human Rights would, in this case, be difficult to apply. If we apply its criterion, it can be said that there seems to be an excessive burden on a particular group (of late returners), who lose all remaining rights and who may no longer have an alternative income. Still, indeed, they have an advantage of which the

---

[47] *Testa, Maggio and Viale* Cases 41/79, 121/79 and 796/79 [1980] ECR 1979.

[48] Regulation 883/2004 has a novelty: the person who returns too late loses all entitlement to benefit, unless the provisions of that legislation are more favourable. Indeed, Member States may have their own rules on the period after which benefits are lost after a late return. These are applicable if they are favourable for the person concerned.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

loss of rights, if they do not satisfy the rules, is the counterpart. Therefore, if such a case were brought before the Court of Human Rights, the question would be whether its own criterion could be usefully applied. Therefore it is interesting to see which criterion the Court would apply.

Conclusion. The approach in the case of direct discrimination against EU nationals does not seem very different. In the case of third-country nationals there is an important difference. There is also a difference in the case of situations which would constitute indirect discrimination for the Court of Justice or an infringement of property.

V. CONCLUSION

This chapter investigated which effects follow from the EU accession to the Convention for discrimination on the ground of nationality in the area of social advantages. In other words, are cases of discrimination on the ground of nationality, which are problematic under the Convention, allowed under EU law?

As was explained in Section I, after accession to the Convention, EU law has to be interpreted so that it is consistent with the Convention, and therefore the comparison is useful to identify the differences.

From the present study it appears that the accession of the EU to the Convention will probably not have effects in all areas discussed here. This was to be expected, first since human rights have already played a role for a considerable time in Community law, and second because otherwise the EU would not have decided to accede to the Convention.

The main differences seem to lie, in the area of the prohibition of discrimination on the ground of nationality, in the treatment of third-country nationals. They are still treated differently from EU nationals in several respects in EU law. A difference in treatment on the ground of EU nationality cannot be found in the case law of the European Court of Human Rights. The *Moustaquim* judgment does not support such a difference, as was explained in Section II.ii.a.

This may lead to decisions in which the European Court of Human Rights decides that EU law, e.g. the exclusion of non-EU nationals from the coordination regulation, from Regulation 492/11 or from the application of Article 18 TFEU, has to be well reasoned. These grounds have to be 'very weighty', and it is possible that this criterion cannot be satisfied, since economic reasons – used within the EU context – are difficult to reconcile with the human rights approach of the European Court of Human Rights. Also in the cases before the Court of Human Rights discussed in Section II.ii. economic arguments were put forward by the state and it appeared that these were not accepted. Is it not likely that it will make a difference when an international organisation uses an economic argument.

Also cases on residence conditions and the loss of benefit rights which were allowed by EU law can be brought before the Court of Human Rights.

From the study it also appears that the courts use different types of reasoning. Since the Court of Justice's case law on indirect discrimination is quite strict, and that of the Court of Human Rights on situations that could amount to indirect discrimination is not so strict, we cannot expect many cases here.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

In case of an infringement of property rights, the Court of Justice sometimes accepts such infringements. It is not clear whether the criteria of the Court of Human Rights would lead to the same outcome as those of the Court of Justice, since the Court of Human Rights uses different criteria. In any case, it seems that the Court has to change its reasoning if it wishes to accept the outcome of the case law of the Court of Justice. Thus the case law of one international court may influence the other after the accession of the EU to the Convention.

In this respect it is interesting that the Court of Human Rights has been criticised for its ad hoc approach to cases on discrimination. Mel Cousins[49] has called the case law 'advocacy of palm tree justice' in cases concerning social security as a property right. By palm tree justice he means a pragmatic approach to justice that is entirely discretionary and transcends legal rights or precedent, enabling the Court to make such an order as it thinks fair and just in the circumstances of the case.

Indeed, also in the preceding sections the lack of consistent rules has been pointed to. Closer contacts between the courts and the need to take the EU dimension and case law into account may force the European Court of Human Rights to develop a clearer framework for the application of its criteria. The outcome is not easy to predict, but it may lead to interesting improvements for the EU, which has to mention new justifications for some forms of discrimination, and the Court of Human Rights, which has to take the reasoning of the Court of Justice into account and is thus challenged to systematise its reasoning.

BIBLIOGRAPHY

Besselink, L (2009), 'The EU and the European Convention of Human Rights after Lisbon: From "Bosphorus" Sovereign Immunity to Full Scrutiny?' in A Sabitha (ed), *State Immunity: A Politico-Legal Study*, Hyderabad: The Icfai University Press; SSRN, http://ssrn.com/abstract=1132788 or http://dx.doi.org/10.2139/ssrn.1132788.

Cousins, M (2008), *The European Convention on Human Rights and Social Security Law*, Antwerp: Intersentia.

Cousins, M (2009), 'The European Convention on Human Rights, Non-Discrimination and Social Security: Great Scope, Little Depth?', *Journal of Social Security Law* 16 118 ff.

Cousins, M (2012), 'Overview of Recent Cases before the European Court of Human Rights and the European Court of Justice (January–March 2012)', *EJSS* 124.

Jacqué, JP (2011), 'The Accession of the European Union to the European Convention on Human Rights and Fundamental Freedoms', *CMLR* 995 ff.

Lock, T (2011), 'Walking on a Tightrope: The Draft ECHR Accession Agreement and the Autonomy of the EU Legal Order', *CMLR* 1026 ff.

Pennings, F (1999), 'The Potential Consequences of the *Gaygusuz* Judgment', *EJSS* 181.

Pennings, F (2013), 'Non-Discrimination on the Ground of Nationality in Social Security: What are the Consequences of the Accession of the EU to the ECHR?' *Utrecht Law Review* 9(1).

Van den Bogaerd, S (ed.) (1997), *Social Security, Non-discrimination and Property*, Antwerp: Maklu.

Van der Steen, I (2008), 'Zuivere interne situaties: geen omwenteling, wel inperking', *NTER* 11 301 ff.

[49] M Cousins, 'Overview of Recent Cases before the European Court of Human Rights and the European Court of Justice (January–March 2012)' [2012] *EJSS* 124.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Verschueren, H (1997), 'EC Social Security Coordination Excluding Third-Country Nationals: Still in Line with Fundamental Rights after the Gaygusuz Judgement', *CMLR* 991.
Verschueren, H (2008), 'De regionalisering van de sociale zekerheid in België in het licht van het arrest van het Europese Hof van Justitie inzake de Vlaamse zorgverzekering', *Belgisch Tijdschrift Sociale Zekerheid* 2 177–232.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:29:49PM
via University College London (UCL)

7. The development of European social security standards

Matti Mikkola

I. INTRODUCTION

I.i Definitions

In Europe, 'social security' is defined as covering social insurance benefits compensating for the loss of gainful activity, family benefits and medical insurance (for access to health services). Social insurance benefits are of two types. They either intend to compensate for the loss of gainful activity, when the level of benefit is defined on the basis of previous earnings, or they aim at ensuring the inclusion and basic standard of living of everyone in a given society in the form of flat-rate benefits like employment support or social pension. In the last resort, this could also be ensured by means-tested *social assistance*.

As a human right, the last of these forms a common fundamental, universal and egalitarian base, the right to minimum income, having an inalienable nature, while an earnings-related income security intends to ensure the fair income of the employees in times of a temporary, or a more permanent, retirement from participation in the labour market.

I.ii Key Legal Sources

As a roadmap for the better future and well-being of workers tired after the Second World War, the International Labour Organization (ILO) was the first to set minimum standards for social security in 1952. The Social Security (Minimum Standards) Convention No 102 was created as the flagship of all ILO social security conventions. It establishes minimum standards agreed on worldwide for nine branches of social security: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit and survivors' benefit.

In the 1960s, Western European states began to create their own standards through the Council of Europe (CoE). In 1961, the *European Social Charter* (the ESC or the 'Charter') was adopted, and in respect of social security standards, it included a reference to ILO Convention No 102 (in Article 12§2) with an obligation on the contracting states to gradually improve the social security level, and to expand the Charter's coverage (Article 12§3). Three years later, in 1964, the Member States of the Council of Europe agreed to the European Code of Social Security (the 'Social Code'), which required states to meet minimum standards for six of the nine contingencies. Some of the contracting states had wanted to go even further, which

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

resulted in the addition of a Protocol, raising the minimum standards of benefits and expanding the coverage.

In 1990, the Member States of the Council of Europe agreed to the Revised European Code of Social Security, which was aimed at bringing the common normative ground up to date. No new contingencies were added, but standards were raised from the level in the Code and Protocol of 1964. It was also agreed that the contracting states should have more flexibility in the organisation of their social security arrangements. This modernisation of the Social Code never took effect, as only one country (the Netherlands) was to ratify this agreement. Even today, the Revised Social Code has yet to take effect.

In 1996 the European Social Charter was in turn subject to a revision, although only modest progress was achieved with regard to social security issues. The reference to the ILO Convention 102 was replaced with a reference to the 1964 Code. In 2014 the minimum standards for earnings-related social security reached the milestone of half a century.

Article 12 of the Social Charter has thus become the basic European social security provision. In paragraph 1, it regulates the right to social security in general. The second paragraph (of the Revised Charter) contains a reference to the Code (1964),[1] which must, therefore, be taken into consideration as a starting point when formalising the content of social security or its minimum standards in relation to previous earnings. The third paragraph of the Article establishes the principle of progressive improvement and requires that states gradually develop their social security systems to a higher level in line with other societal developments. And, finally, the fourth paragraph sets out the co-ordination rules to improve the situation with respect to how a country's legislation applies in an individual case and how accruing and accrued social security rights and benefits are reconciled with the movement of individuals from one country to another.

All paragraphs of Article 12 of the ESC are abstract by nature but in a different way. Paragraph 1 is an *open norm* and dynamic for interpretation of the adequacy of the system and minimum standards of it. Paragraph 2 is a *rule* on earnings-related social security requiring respect for the standards of the ILO Convention 102 or the Social Security Code of the Council of Europe. Paragraph 3 is a *flexible norm* on changes in social security, including the norms of cutbacks. Finally Paragraph 4, which will not be discussed further in this chapter, is a *co-ordination rule* and expected to be supported by bilateral and multilateral agreements of the states. In addition to Article 12 of the ESC also Article 13 on social assistance defines people's right to the fundamental minimum income.

The minimum legal protection is provided also under Articles 3, 6 and 8 of the European Convention on Human Rights (ECHR), the first of which intends to ensure the right to human existence and dignity. The second requires guarantees of a fair trial and the third sets standards for protection of family life. Finally, Article 1 of the First Additional Protocol of the ECHR provides protection for the maintenance of social security savings (property) as discussed above more closely in Chapter 3 and Chapter 5 of this volume.

[1] The 1961 Charter contains a reference to the almost identical ILO Convention No 102 (1952).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

In principle, the European Union does not have competence to legislate in the field of social security other than for the rights for protection of migrant workers (co-ordination). The 2007 Treaty of Lisbon, however, promulgated the Charter on Fundamental Rights of the EU (the Nice Protocol of the year 2000) as a binding treaty. Article 34 of the EU Charter includes a material provision on social security and social assistance and in Article 53 a reference is made to human rights by providing that 'the level of protection under Union law shall not be less than that defined by international agreements to which the Union or all Member States are party'.

II. EARNINGS-RELATED STANDARDS

II.i ILO Convention 102 and the Social Code of the Council of Europe

ILO Social Security Convention 102 (1952) and the Social Code of the Council of Europe (1964) define social security in terms of nine contingencies or social risks. These nine contingencies are also called traditional or 'old' risks. As mentioned, they are: medical care, sickness, unemployment, old age, employment injury, family, maternity, invalidity, and death of a breadwinner. Related loss of income is mainly compensated for by social insurance.

To ratify ILO Convention 102, a state must accept at least three of the nine social security branches, one of which must concern unemployment, old age, work injury, invalidity/disability, or survivors' benefits. The European Committee of Social Rights, the supervisory body of the ESC, therefore considers in principle that a state which is not in compliance with at least three parts of Convention 102 does not fulfil Article 12§2 of the Charter either.[2]

II.ii Article 12§2 of the ESC

Article 12§2 of the Revised Charter obliges the states to establish and maintain a social security system, which is at least equal to that required for ratification of the European Code of Social Security. The standards enshrined in the Code adopted by the Council of Europe in 1964 are virtually identical to those of ILO Convention 102. The main difference is that to ratify the Code signatory states must accept six parts, not three.[3]

Article 12§2 of the Revised ESC states the following:

> With a view to ensuring the effective exercise of the right to social security, the Parties undertake: …

---

[2] So far, this situation has arisen three times.

[3] It will be recalled that it is the ILO Committee of Experts which monitors the implementation of the Code by the Contracting Parties. Its conclusions are then examined by the Council of Europe's Governmental Committee (ESCC), which in turn submits a report to the Committee of Ministers. Finally, the Committee of Ministers adopts a resolution stating whether the Parties to the Code have honoured their obligations.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

2. to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security;

The objective of social security of employees is to maintain the living standard reached by means of gainful employment. As such, it should guarantee, as far as possible, individuals and their families a reasonable income if the wage is interrupted temporarily in the course of an individual's working career or after it has ended.[4]

The requirement in the light of Article 12§2 of the ESC is that the benefit reaches at least the level of 40–50 per cent of previous income depending on the type of benefit, family relations and the version of the Code followed.

II.iii Comparison of Earnings-related Standards

A comparative analysis of minimum standards under international conventions in force in relation to previous earnings reveals that there are no great differences between the conditions set under the different instruments (see Table 7.1).

Table 7.1 Periodical payments to standard beneficiaries

Contingency	Percentage*		
	ILO-102	Code	Protocol
Short-term benefits 1. Sickness 2. Maternity 3. Unemployment	45	45	50
4. Employment injury a) Incapacity for work	50	50	50**
b) Total loss of earning capacity c) Survivors	40	40	45
Long-term benefits 5. Invalidity	40	40	50
6. Old age 7. Survivors	40	40	45***

Notes:
* Percentage of previous standard basic earnings of skilled workers.
** 66 ⅔ if constant aid is needed.
*** For two children if a widow's pension, conditional on her being incapable of self-support.

[4] D Harris and J Darcy, *The European Social Charter* (Transnational Publishers Inc 2001) 27–28 and L Samuel, *Fundamental Social Rights – Case Law of the European Social Charter* (Council of Europe Publishing 2002) 287–289.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

The standards that were defined half a century ago had to be created on the basis of existing statistics as regards the levels of benefits as well as the scope of persons entitled to them.

Previous earnings were defined as relative to the previous standard basic earnings of a skilled worker. Because statistics did not necessarily cover all professions, what had to be used as assessment criteria were the average earnings of an industrial worker, or a skilled worker employed in an industrial sector.

The aforementioned level applied to situations where the beneficiary was a standard household, which was defined as a man with a wife and two children. It was decided that the beneficiary of the maternity benefit would be the woman concerned, while the beneficiary of the survivors' benefit would be the widow with two children.

II.iv Changes of the Context

The fulfilment of the requirements laid down in these provisions has met many changes that have occurred in labour relations and working life more generally since the provision was adopted half a century ago.

In the Europe of the 1950s, the object of protection was a male factory worker (blue collar worker) with a wife and children at home. It was considered important to protect the family's sole breadwinner against ill-health and work accidents in particular. Based on his employment status, the other family members were entitled to child benefits, health services and family pensions in case he died.

Circumstances today are quite different. Families with both parents typically have two adults who are gainfully employed; who mostly work in the service sector; and who do not risk their physical health as much as before, but have to cope with mental pressures caused by the intensity of work and by the insecurity of precarious employment. As for choice of employment, place of residence, and even the country, they are much more mobile than their factory-bound ancestors. Their wages, working hours and even social security are arranged differently than two generations ago when ILO Convention No 102 and the Social Code came into effect.

With the level of compensation defined by these treaties, it is possible for the social security benefits of individuals employed in fragmentary or low-wage sectors to fall below the subsistence level of income. For this reason, the European Committee of Social Rights required in 1995 that adequate social security must provide a level of income above this subsistence level (the so-called poverty threshold).[5] In 2004 the Committee came to the conclusion of defining this threshold under Article 12§1 of the ESC in relation to the overall net median income of a country.

[5] As early as 1995, the European Committee of Social Rights held that a social security benefit that is intended as a first-resort benefit must not be reduced, even for economic reasons, to a level below the poverty threshold (*Conclusions* XIII-4, Netherlands).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

III. MINIMUM LEVEL OF SOCIAL INCOME

III.i An Adequate Social Security System

Each country is free to define its own social security system. The ESC intends neither to impose a common model nor to harmonise social security legislation, but rather to lay down two minimum standards, one standard in relation to previous earnings (development standards) and another guaranteeing the (absolute) minimum income threshold. First of all, the Charter requires that states must ensure the right to social security through the existence of a social security system established by law and functioning in practice.

Social security, for the purposes of Article 12, covers both occupational and universal schemes. It includes contributory, non-contributory and combined benefits linked to certain contingencies. These are benefits which are granted in the event of a risk materialising, but are not intended to compensate for a state of need as such, which is the function of non-contributory social benefits and in particular of social assistance systems. Article 12§1 of the ESC states: 'With a view to ensuring the effective exercise of the right to social security, the Parties undertake: to establish or maintain a system of social security; …'.

Upon ratification of Article 12§1, the state commits to (1) establishing and maintaining a social security system that conforms to what is defined by means of a reference in the second paragraph, (2) fulfilling, in principle, the current social needs and (3) not discriminating against any population group (Article E).

The European Committee of Social Rights case law on this paragraph reflects a broad understanding of social security, while remaining bound to the traditional contingencies.[6] Before the end of the 1990s, the European Committee of Social Rights relied on the ILO's monitoring practice[7] in its assessment of the adequacy of social security systems. Since 2000, the European Committee of Social Rights case law has become more focused in respect of risk coverage, the scope of persons, minimum standards, as well as in respect of the conditions conferring entitlement to benefits.

By 2006, in light of the Social Charter and the related case law, a system of social security could be considered *adequate* when:

(1) the system covered all the traditional (old) social contingencies;
(2) it was collectively funded, which was guaranteed by the public authority;
(3) conditions of entitlement to social security were reasonable;
(4) loss of income was compensated promptly;
(5) the minimum level of benefits was higher than the poverty threshold and sufficient for a person and his or her family to maintain their standard of living, at least on the level defined in ILO Convention 102 or the European Code of Social Security;

---

[6] *Conclusions XIII-4* (2004). Statement of Interpretation on Article 12.

[7] For the Committee of Experts of the ILO, see also Chapter 8. The Committee of Experts is also the supervisory body of the European Code of Social Security.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

(6) the system's scope of persons included the majority of workers and, as regards universal benefits, the whole population; and finally
(7) when everyone enjoyed the possibility of submitting an appeal to an independent body for review of decisions concerning the allocation of social security benefits.

III.ii Fundamental Threshold

Subsequently, in 2004, the European Committee of Social Rights developed its principal guidelines and proceeded to make country-specific assessments in relation to benefit levels.[8] The point of departure adopted was that any income-substituting benefit paid should, in principle, amount to at least 50 per cent of the country's net median equivalised household income per adult. In determining the net median income, all income should be taken into account: capital income, wages and social income.

Then a comparison point should be fixed on the equivalised net median of these sources of income. The median equivalised income of persons in a household is established by adding up all monetary income received from any source by each member of the household. In order to reflect differences in household size and composition, this total is divided by the number of 'equivalent adults' using a standard scale (the so-called modified OECD equivalence scale). The resulting figure is attributed to each member of the household and is calculated on the basis of the Eurostat (60 per cent) at-risk-of-poverty threshold value.

In 2005, the Committee further specified its case law on the indicative 50 per cent rule by defining that countries may be in compliance with this standard if the 50 per cent threshold in individual cases is reached by a combination of social security benefits and supplementary benefits, or other in-cash social income. Similarly, the compliance could be reached with a combination of cash benefit and public services with low pay or no pay. It is left to the states to provide sufficient evidence that such a combination of benefits ensures a level of 50 per cent in individual cases in practice, and at least in typical situations. Furthermore, to integrate the people dependent of the minimum income into the mainstream of a market economy society, the European Committee of Social Rights has set another standard for the combined minimum: the cash part of the benefit must never fall below 40 per cent of the net median.[9]

In many countries, 40 per cent of the equivalised net median income is below the national poverty threshold. Therefore, whatever the national method of ensuring the social security of the population (social security benefits alone, or in combination with other types of social income), a benefit under the level of 40 per cent of net median income is considered by the Committee to be *manifestly inadequate*.[10]

The first countries to be found in breach of the Charter on this item were the four Central and East European Countries. In 2004 Bulgarian unemployment benefit, minimum pension and disability pension; Lithuanian unemployment benefit and old-age pension; Romanian agricultural workers' pension; and Estonian unemployment

[8] *Conclusions XVII-1*.
[9] M Mikkola, *Social Human Rights of Europe* (Legisactio 2010) 312–319.
[10] *Ibid*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

support were all assessed to be manifestly inadequate,[11] since their levels were below 40 per cent of the aforementioned equivalised net median income. After 2008 many other countries across Europe have met the same fate.

III.iii Two Thresholds, Different Indicators

The threshold under Article 12§2 of the ESC, 40–50 per cent of the previous earnings is *individual* by nature. It is not very high in relation to the purpose of the provision, which is to ensure a fair standard of living for the person and the family.

The absolute minimum threshold under Article 12§1, 50 per cent of the net median income, is based on a *collective indicator* where all income of the country is noted, i.e. capital income, wages and social income. The threshold of 50 per cent is rather low. The required cash benefit, 40 per cent of the net median, is close to the level of subsistence minimum and does not guarantee as such the inclusion of the beneficiaries into mainstream society and must be supported with other benefits or low or no paid services.

The European Committee of Social Rights has set a requirement that the absolute minimum is provided and reached in practice under each branch.[12] Moreover, the Committee recalls that Article 12§1 requires social security benefits to be adequate, which means in addition to being in reasonable proportion to the previous income that they should never fall below the at-risk-of-poverty threshold defined as 50 per cent of median equivalised income and as calculated on the basis of the Eurostat at-risk-of-poverty threshold value.[13]

In conclusion, the minimum level of social security is defined by two thresholds as outlined in the Figure 7.1.

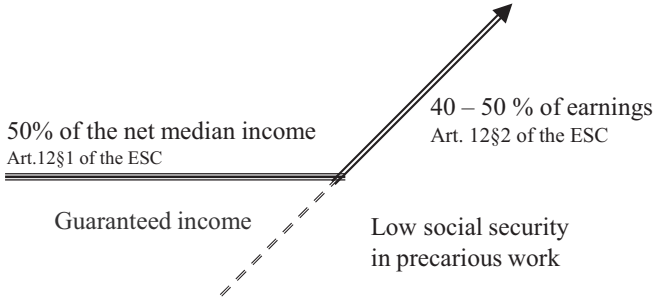
40 – 50 % of earnings
Art. 12§2 of the ESC
50% of the net median income
Art.12§1 of the ESC
Guaranteed income
Low social security
in precarious work

Figure 7.1 Combination of two minimum levels

In the event that the country ratified both Paragraphs 1 and 2 of Article 12, the combination of the minimum standards of social transfer income is: (1) 40–50 per cent of the previous earnings, which does not help people to avoid poverty if the work is

[11] *Conclusions XVII-1* and *Conclusions XVIII-1*, all countries.
[12] *Conclusions XIII-4*, General Introduction on Article 12.
[13] *Conclusions 2006*, Bulgaria.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

low paid or the work history fragmentary and (2) always at least 50 per cent of the net median to avoid poverty and social exclusion.

IV. DYNAMIC PROVISION: ARTICLE 12§3 OF THE ESC

Article 12§3 of the ESC is based on the idea of progressivity. Originally it was intended to guarantee to all groups of people, also the beneficiaries of social income, their share of the growth of the common wealth. Progress was understood in two ways: (a) commitment by countries to international conventions with standards higher than the previous standards or (b) a rise in the levels of benefits nationally, an expansion of the scope of persons, or improvements in other related conditions.

Under difficult economic circumstances, when many states cut their social benefits, the European Committee of Social Rights has faced a new situation. Are the cutbacks legitimate in the light of the international commitments of the states? The brief answer from the view point of the European Committee of Social Rights is: not as a rule, but exceptionally yes, if they comply with the three conditions of Article G in relation to Article 12§3 of the ESC.

IV.i Progressive Development

Article 12§3 of the ESC states: 'With a view to ensuring the effective exercise of the right to social security, the Contracting Parties undertake … 3. to endeavour to raise progressively the system of social security to a higher level.' The progressive development of the social security systems 'to a higher level'[14] is the moot point here. The European Committee of Social Rights has always emphasised the dynamic nature of this provision, requiring that states make constant efforts to improve the systems in terms of scope and level of protection afforded. Such efforts could include the extension of the personal scope, coverage of new risks, new benefit types, and increases in benefits greater than the increases in the cost of living.

When the achievement of the right in question is exceptionally complex and particularly expensive to resolve, a State Party must take measures that enable it to achieve the objectives of the Charter within a *reasonable time*, with measurable progress, and to an extent consistent with the *maximum use of available resources*.[15] However, economic progress is the prerequisite for social security development, and, in fact, the rationale behind the principle of progressive development, according to which the distribution of the economy's gains should also take into account that part of the population that is dependent on social income transfers.

In relation to the socio-economic developments over the past two decades, the Committee's supervision has increasingly become a 'defensive' exercise, which attempts to ensure that changes to the social security systems do not unduly restrict the scope and level of social security provision.

---

[14] *Conclusions XVI-1*, p. 11, Statement of Interpretation on Article 12.

[15] *Autisme-Europe v France*, Complaint No 13/2002, Decision on the merits of 4 November 2003, §53.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

IV.ii Public Savings

Short-term economic losses are not held as permissible grounds for any sort of cutbacks, since Article G (Article 31 of the 1961 Charter) does not permit such restrictions. Nor does it permit any restrictions on pure economic or ideological grounds.

However, in line with the aforementioned rationale, the European Committee of Social Rights has accepted that in the event of *long-term economic slowdown*, changes to social security could be made accordingly. As from supervision cycle XIII-4 (1995), the European Committee of Social Rights adopted a list of information requests aimed at a more systematic examination of social security reforms.[16] The list was updated in cycle (2002) XVI-1. The information requested concerns:[17]

- the nature of the changes (field of application, conditions for granting allowances, amounts of allowances, duration, etc.);
- the reasons given for the changes and the framework of social and economic policy in which they arise;
- the extent of the changes introduced (categories and numbers of people concerned, levels of allowances before and after alteration);
- the necessity of the reform, and its adequacy in addressing the situation which gave rise to these changes (the aims pursued);
- the existence of measures of social assistance for those who find themselves in a situation of need as a result of the changes made (this information can be submitted under Article 13); and
- the impacts obtained by such changes.

On the basis of replies to these questions, the European Committee of Social Rights has ascertained whether the main purpose of the reforms is to ensure the *maintenance and sustainability* of the social security system. The Committee has held that the pursuit of economic goals is not necessarily incompatible with this requirement. In making its assessment in this respect the Committee considers whether the means used by the Parties to achieve their aims are *appropriate and reasonable*, i.e. whether the reforms are necessary to achieve the desired results and are proportionate therefore.

Measures to consolidate public finances may be considered as a means to contribute to the maintenance and sustainability of the social security system. However, the modifications should not undermine the effective social protection of all members of society against social and economic risks and transform the social security system into a basic social assistance system.[18]

This circumscription of any cutbacks or changes of a restrictive nature to a social security system means that states must maintain basic, compulsory social security

---

[16] *Conclusions XIII-4* and *Conclusions XVI-2* (2003), Introduction.

[17] *Conclusions XVI-1, 1,1* Statement of Interpretation on Article 12, see also *Digest of the Case Law of the European Committee of Social Rights* (Council of Europe Publishing 2008), 91–92.

[18] *Conclusions XIV-1*, 74, Statement of Interpretation on Article 12.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

systems which are sufficiently extensive, as this is the only effective guarantee against the differential treatment inherent in optional insurance schemes. The collective nature of the funding of compulsory social security, through contributions and/or taxation, is a key element in this guarantee, as it allows the risk to be apportioned between the different members of the group.[19]

In principle the question of cutbacks is linked not only to Article 12§3 but also to Article G. Under the last mentioned the conditions for legitimate cutbacks are that: (1) they are provided in law (statutes, collective agreements, case law or generally accepted doctrine), (2) they have a justified reason, something other than just economic or ideological reasons, and (3) the cutbacks are necessary in a democratic society.

As far as the third condition is concerned the European Committee of Social Rights developed further its case law with the five Greek cases in 2012 (CC 76–80). In the light of them, the cutbacks might be necessary (1) if their plausible intent is to secure the *viability of the system*, (2) if the action is *not discriminatory* to any group of people, (3) if the cut benefits *do not fall below the (absolute) minimum* (Arts 12§1 and 13§1) level, and (4) considering the proportionality in assessing the restrictions and *their impacts*. In concluding negatively in the Greek collective complaint on pensions (CC 76) the Committee based its argumentation among other grounds on *expected factual impacts* that the cut *benefits fell below minimum standards* and *caused pauperism for the rest of the life* of the pensioners concerned.

IV.iii Ceiling for Requirements

Article 12§3 of the Charter does not set any ceiling for the required development. In principle 'progress' might mean (a) efforts to reach the minimum threshold; or (b) efforts to keep the valid standards on the same relative level, while salaries and capital income are rising; or (c) efforts to even higher standards for a redistribution of income; or (d) additional steps towards extended coverage of the new social risks or widened scope of persons; or (e) further ratification of the Protocol or Revised Code.

In the General Introduction to Conclusions 2009, the European Committee of Social Rights clarified its interpretation on this point in three respects:[20] Firstly, it considered that the existence of a social security system of a higher level than that required under Article 12§1 or Article 12§2 is not presupposed under Article 12§3. Secondly, it stated that a situation of progress may consequently be in conformity with Article 12§3 even though the social security system has not attained the levels required under the two first paragraphs of Article 12. Thirdly, it repeated that a partly restrictive evolution in the social security system is not automatically in breach of Article 12§3. On this point the Committee referred to its previous case law by reminding that the Committee has already detailed the criteria to assess such situations. (See Section IV.ii. above).

---

[19] *Ibid.*, 48.

[20] C 2009, General Introduction, p. 11.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

IV.iv Cutbacks in Greece

In 2012, five trade unions lodged collective complaints (Nos 76–80/2012) against the Greek government because of changes to the conditions and structures of pension systems, including cutbacks in benefit levels.[21] The European Committee of Social Rights assessed the conformity with the Charter of these changes in the light of Articles 12§3 and 31 of the 1961 Charter and Article 4 of the Additional Protocol of 1988. The cited provisions cover progressive development of social security, restrictions of it and rights of the elderly. For the Committee, the key legal questions were whether the Greek government had sufficiently good reasons for introducing the restrictions and whether the restrictions and their serious negative impacts for pensioners were necessary in a democratic society.

As the starting point of its assessment the Committee referred to its statement from 2009, according to which:

> [T]he economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter. Hence, the governments are bound to take all necessary steps to ensure that the rights of the Charter are effectively guaranteed at a period of time when beneficiaries need protection the most.[22]

On the other hand, the Committee referred to its case law from 1995 where it explicitly considered that restrictions or limitations to rights in the area of social security may be compatible with the Charter in so far as they appear necessary to ensure the maintenance of a given system of social security.[23] On this point the Committee referred to its two other previous decisions, considering: (a) that the Contracting Parties may consider that the consolidation of public finances, in order to avoid mounting deficits and debt interest, constitutes a means of safeguarding the social security system,[24] and (b) that the adoption of measures aiming to ensure the financial viability of pension schemes, regard being had to demographic trends and the employment situation, may come within this field.[25] To find out whether the amendments would in reality ensure the maintenance of the system, the requirement is that the government supply realistic evaluations and sufficient evidence, which the Greek government had neglected to do in these complaints.

The other important condition for assessing the conformity with the Charter of the results and impacts of changes is that everyone should be guaranteed an income above the poverty line i.e. preventing people falling into poverty. Also on this point the government failed to bring evidence based on reliable studies and to refute arguments

---

[21] *Federation of Employed Pensioners of Greece (IKA–ETAM) v Greece*, CC No 76/2012; *Panhellenic Federation of Public Service Pensioners v Greece*, CC 77/2012; *Pensioners' Union of the Athens-Piraeus Electric Railways (ISAP) v Greece*, CC 78/2012; *Panhellenic Federation of Pensioners of the Public Electricity Corporation (POS-DEI) v Greece*, CC 79/2012; *Pensioner's Union of the Agricultural Bank of Greece (ATE) v Greece*, CC 80/2012.

[22] CC 76/2012, para 75, referring to General introduction to *Conclusions XIX-2*, 2009.

[23] *Conclusions XIII-4*, p. 143, General observation on Article 12§3.

[24] *Conclusions XIV-1*, Austria.

[25] *Conclusions XIV-1*, Belgium.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

based on information from other sources, which led to the conclusion that the cutbacks in benefit were expected to throw many Greek pensioners into deep pauperism.

Finally, the Committee referred to the case law of the European Court of Human Rights and the ECHR on the lack of protection for those who were already the beneficiaries of the pensions, as well as on the entering into force of the laws with no transitional period.

In its decisions, the Committee concluded that everything else criticised by the complainant trade unions (holiday pay, accrual rights and age thresholds) did not in itself amount to a violation of the Charter but the reduction of the levels of pensions, with the side-effects and impacts as described above, led the Committee to conclude negatively:[26]

> The Committee finally holds, as has been done by the Court as concerns the Convention that any decisions made in respect of pension entitlements must respect the need to reconcile the general interest with individual rights, including any legitimate expectations that individuals may have in respect of the stability of the rules applicable to social security benefits. The Committee concludes that the restrictive measures at stake, which appear to have the effect of depriving one segment of the population of a very substantial portion of their means of subsistence, have been introduced in a manner that does not respect the legitimate expectation of pensioners that adjustments to their social security entitlements will be implemented in a manner that takes due account of their vulnerability, settled financial expectations and ultimately their right to enjoy effective access to social protection and social security.

IV.v Social Assistance as a Last Resort

Article 13§1 of the ESC provides a standard for the level of the minimum income for inclusion: what is necessary to cope on a daily basis and be able to live an active life with others in a particular society. The level of that income should thus be sufficient to satisfy the basic economic, social and cultural needs, i.e. to guarantee a person and his or her family members subsistence and housing.

In the supervisory cycle 2006 (XVIII-1), the Committee made a principal decision that the level of the minimum income should not fall below 50 per cent of the net equivalised median income. The threshold was defined in the same way as in respect of the minimum standard for social security benefits under Article 12§1 ESC two years earlier. In cases where the level would be found to be below 40 per cent, the Committee's conclusion would be: 'manifestly inadequate'.

In a material sense, the necessary minimum level of support requires:

- what a person needs for subsistence, housing, health, family life and necessary communication;
- what is necessary for participation and inclusion in the community;
- at least 50 per cent of the net equivalised medium income of which the great majority (40 per cent rule) should consist of cash benefits.

---

[26] CC 76/2012, para 82.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

Cash benefit must never be less than 40 per cent of the net median but similarly with the social security standards (see Section III.ii), last-resort social assistance could be supplemented by privileged income, housing allowance, maintenance allowance, care allowances and other cash benefits, etc. When assessing the situation as regards the 50 per cent rule threshold also several types of public services with a low fee or no fee and price subsidies could be taken into account. It is not, however, the duty of the supervisory body to produce the evidence needed for an overall judgement of the situation in a country, but the burden of proof lies entirely on the country in question.

IV.vi Situation in the Countries

The differences with the absolute minimum threshold among the EU Member States were significant in 2013 (see Table 7.2).[27] The countries with high standards had problems complying with minimum thresholds of both under the social security provision (Article 12) and social assistance (Article 13). Quite often, however, they did comply with at least one of them.

Table 7.2 50 per cent of net average income in some countries

	€	Soc. Sec. Art. 12§1	Soc. Ass. Art. 13§1
Norway	1,514	+	–
Denmark	1,100	+	–
Netherlands	846	+	+
Germany	793	o	o
Greece	458	–	–
Bulgaria	121	–	–
Romania	88	–	–

Notes:
+ positive
o deferral
– negative

During the latest supervision cycle (2013) Norway and Denmark had the highest minimum income thresholds in Euros. Although the threshold was very high in these countries, they still complied with the required social security standards under the Charter. Both countries had, however, problems with the last-resort social assistance standards because of the low level of protection of those under 25. The Netherlands complied with both standards. Germany did not report in an adequate way.

Furthermore, the two countries with lowest standards, Bulgaria and Romania, never complied with any of the minimums.

[27] Conclusions country by country 2013.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

Although the Greek government had also had problems in the past, the European Central Bank and the IMF supported by many EU states pushed the Greek government to lower their standards even more (see Section IV.iv.).

V. RELATIONSHIP WITH EU LAW

The relationship of Article 12§§1, 2 and 3 of the ESC to the EU law is complicated. Unlike the US, China and the Russian Federation, the EU is not so far a contracting party in any of the key treaties of human rights. It has no direct obligation to respect the minimum standards of income. However, in the Treaty of Lisbon (2007) a binding tie between the human rights and fundamental social rights of the Union was established.

Article 6§1 of the Treaty on European Union (TEU) makes a reference to the Charter of Fundamental Rights of the EU (the EU Charter or the EUCFR), which shall have the same legal value as the basic Treaties. Article 6§2 includes a 'constitutional promise' that the Union shall accede to the ECHR. Furthermore in Article 6§3 of the TEU, the rights of the ECHR and the constitutional traditions common to the Member States are required to be respected as general principles of EU law. Finally, under Article 51 of the TEU it is stated that the Protocols and Annexes to the Treaties shall form an integral part thereof.

V.i Fundamental Rights of the EU

There is a provision of social security and social assistance in Article 34 of the EUCFR:

1. The Union recognises and respects the entitlement to social security benefits and social services providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment, in accordance with the rules laid down by Union law and national laws and practices.

Article 34 of the EUCFR principally makes social security part of EU law but the horizontal provision Article 51 sets two important limits for the application of Article 34. The Charter (1) is applicable only in implementing of Union law and (2) does not extend the competence of the Union.

Article 51 of the EUCFR reads as follows:

1. The provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their respective powers and respecting the limits of the powers of the Union as conferred on it in the Treaties.
2. The Charter does not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined in the Treaties.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

Finally, Article 151 of the Treaty on the Functioning of the European Union (TFEU) makes a general reference to the ESC, strengthening the tie of social human rights and basic rights in the European Union. However, in order to make this provision functional in practice, more concrete norms and clarity, in particular for the authority to set up standards, are needed.

V.ii Competence to Set a Minimum Threshold

Article 153 (§2 and §4) of the TFEU are the special provisions to regulate the *competence of the Union* in the area of social security, according to which the competence of the Union is *missing on issues of structure and financing* but leaves operational space for the EU bodies to set minimum standards.

Based on Paragraph 2 of the same provision, the Union has, however, already for years improved knowledge, developed exchanges of information and best practices, promoted innovative approaches and evaluated experiences between the Member States. The same paragraph authorises the Union bodies to set by means of directives *minimum* standards of social security, if *unanimity* is reached by the states.

For the time being this authority has not been used. On the contrary, one of the key institutions of the Union, the Central Bank, together with the IMF and with the support of several states, has required governments suffering economic crises such as Greece to go below the minimum thresholds and has thus directly violated the fundamental rights of people.

Using the given competence the EU is authorised to set important guarantees for all European citizens against poverty and social exclusion. Using that authority would safeguard the position of the most vulnerable in a society, would heighten the social profile of the Union and would help governments to reduce the instability in their societies.

V.iii No Less than Standards of Human Rights

In the event that the idea of this type of social reform were adopted, the question still remains, whether the standards of the EU could be defined below the standards of human rights or not. In the light of Article 53 of the EU Charter the answer is clear: they could not.

Article 53 of the EUCFR reads as follows:

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

Article 12§1 of the ESC and its minimum standard of social income is ratified by all Member States except the latest EU Member State, Croatia. Paragraphs 2 and 3 are not ratified by several member countries of the EU, which raises the question of whether all Member States really are party to the ESC as required by Article 53 of the EU Charter.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

Continuing the paragraph-by-paragraph approach one could adopt the interpretation that (1) the provision of an absolute threshold (12§1) covered all states until 2014, (2) all states were committed to it, but (3) not anymore after the accession of the newest member. This way of reasoning leads to speculation as to whether all Member States are party to the international standards and excludes of course also the applicability of Paragraphs 2 and 3 of the article because not all countries are bound by them.

The other approach would be to consider the Charter as one entity. When the states *signed* the ESC, they principally *accepted the norms and standards* of it. The ratification of the treaty deepened the commitments; the countries committed themselves to complying with the norms and standards. This does not, however, mean that the non-ratification of any of the articles or paragraphs would lead to the withdrawal of the general acceptance of the norms or standards of the Charter.

This second approach leads to the interpretation that the ESC is one of the international treaties referred to under Article 53 of the EU Charter, which requires that the minimum standards of the ESC be taken into account while setting the minimum thresholds for social security by the EU bodies. Finally, it means that the standards of the EU may not be interpreted as being below the standards of Article 12 of the ESC.

V.iv Challenges for the EU

EU countries are all facing restrictions to their welfare states as well as the concurrent demographic challenges, i.e. ageing populations. Under such circumstances the states should actively assess the situation in the countries and adopt best practice in crafting their own policies. The structural changes might not have any priority while designing minimum standards, because they are the same in all benefit systems. More important is to find out where these standards are not respected and what steps need to be taken to be in compliance with the international commitments on this point.

The objective must be the inclusion of all citizens in mainstream society, which requires that all citizens must be ensured an income at least at the level of 50 per cent of the equivalised net median income of the country. For that aim the EU has full competence.

VI. SOCIAL SECURITY IN A NEW CONTEXT

VI.i Emergence of Neo-liberalism

At the beginning of the 1980s Denmark and the Netherlands both had high levels of social expenditure and high unemployment, which led both countries to start an overhaul of their generous models. The first reorientation took place some years before Margaret Thatcher started to put in practice her 1979 programme of ‘less government, more market’. The programme paved the way for the reorientation of social policy based on ideas of neo-liberalism, including:

(1) breaking with the workings of social dialogue;
(2) privatisation of public services;

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

(3) adding more conditionality for the granting of benefits (making work pay);
(4) reducing taxes and contributions; and as a result of that,
(5) making private companies more compatible by increasing the profits of companies and their capacity for investments.

The long-term positive impacts for an improved level of employment would justify the new policy.

The Thatcherite *neo-liberal* programme became a reality in the UK from 1986 onwards. Initially it did not seem to have any influence on the European continent but gained a foothold in two other previous EFTA (European Free Trade Agreement) countries, Finland and Sweden, at the height of their banking crises of the 1990s. Finland's economy contracted by 14 per cent in just three years, in addition to the monetary crisis of losing the markets in the former Soviet Union, which constituted more than 20 per cent of its foreign export base. The Prime Ministers of both countries, Carl Bildt and Esko Aho, declared the period of welfare states as a thing of the past and governments in both countries started cutbacks in benefits and public services and the promotion of private services.

Meanwhile, these countries were on the way to entering the EU, which increased the pressure on them to give up their traditional universal system. In addition to what had happened in Denmark already in the 1980s, now the *Nordic welfare model* was shaken to its roots in these two countries and faced a period of constant flux.

The Nordic welfare model was given a new direction with: (1) less co-ordinated social dialogue than previously; (2) decreased public and increased private services, with less equality; (3) weaker protection against new sources of risk, with the impact of increased poverty and social exclusion; and (4) facing a shift from universal social security to a multi-tier system following the guidelines of the rest of Europe.

In fact the whole of Europe was facing great changes even before the banking crises. The fall of the Soviet Union and the Berlin Wall triggered the end of the ideological division of Europe. The first and the second world became one market, with more space for neo-liberal thinking. Finally, the emergence and rapid development of information technology opened up the global markets and led to what was hailed as a *new economic order*.

Once again, another ideological alternative programme was developed in the UK, subsequently formulated by Anthony Giddens (1998). His programme could be understood as a kind of synthesis of the welfare state model and the 'less government' ideology. It was deeply inspired by the 'Third Way' thinking, which tried to combine welfare state approaches with incentives to become active and sanctions if the beneficiary did not comply. From a theoretical point of view this thinking was inspired by communitarianism, which emphasised the link between social rights and social commitments ('No rights without responsibility'). The compromise was to accept client fees and the privatisation of public services as well as cutbacks in benefits, with the intention of activating individuals in their search for work: 'work first' and 'improved skills' instead of just cash unemployment transfers.

The new ideas were adopted at that time by social democratic polities, first by Tony Blair in the UK, then followed by Gerhard Schröder in Germany, Göran Persson in Sweden and Paavo Lipponen in Finland.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

In Germany the programme was given the name Agenda 2010. The most significant change concerned the structural changes of compulsory pension systems and adjustments of their level from 67 per cent of the previous earnings down to 46 per cent until 2020 and 43 per cent until 2030. The unemployment benefit was made into a two-tier system, where the length of income-related benefits was shortened from three years to six months–two years, depending on the length of service. Thereafter the benefit would continue as means-tested social assistance conditional upon the willingness of the beneficiary to take steps for a swift re-integration into the labour market set out in a job-seekers' agreement.

Instead of saving social democracy the result was quite the opposite. Thereafter the new centre-right governments followed the same compromise model and managed to stay in power much better than their predecessors. Giddens' 'Third Way' became a roadmap for many countries in Europe.

VI.ii Debt Crises and Divergent Social Development

The financial crisis, which reached its nadir with the Lehman Brothers bankruptcy (2008), accelerated the process of cutting back social security benefits all over Europe, the Nordic countries included. They were prepared to continue with a system of public savings, where it had been in use already for 20 years.

The Nordic states continued by cutting the general social assistance benefits, by increasing the activation requirements of the unemployed and by shortening their entitlements[28] as well as by continuing their programmes of privatisation of welfare services.

Finally, the more far-reaching changes were made first by Denmark with increases in the formal retirement age (65/67/70), which is automatically increased in line with life expectancy. Equally, the adjustment of level of benefits was linked automatically to longevity. In the 2020s the retirement age is expected to be two years higher than it is at present.

Sweden was the next and then Finland to move towards a flexible pension age but has yet to be followed by Norway. Finland started by first removing all means testing from the flat-rate unemployment benefit and, more importantly, increased all minimum levels of benefits by €120 per month and last-resort social allowances by 6 per cent from 2012 onwards in order to combat poverty and social exclusion more effectively. Both measures helped the country to comply with the absolute 40 per cent cash benefit threshold of Article 12§1 of the ESC.

Many of the European countries that had managed to avoid the banking crises of the 1990s quickly fell into debt crises and economic difficulties of their own in 2008 and after, which in turn led them into crises with their social and economic policies. These

[28] Additional conditions were introduced into the unemployment benefit systems for (1) entering the system and requiring a longer work history (*inträdesbiljett*) of the applicant, (2) greater flexibility when accepting the work offered or training or any labour market measure, (3) reducing the duration of benefit payments (Denmark 7–4–2 years; Sweden 200 + 100 days), and (4) establishing a lower level of benefit, in particular for immigrants and persons aged under 25. The two-tier system had previously only existed in Finland.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

financial and fiscal developments made many countries dependent on instructions from the IMF and the European Central Bank. The most dramatic of these was the development in Greece, which lost a quarter of its economic capacity in just five years and even more of the purchasing power of the population.

The German government led by Angela Merkel, however, continued with more comfortable economic outcomes and took its own track. First it adopted a similar programme to that of the Nordic countries, i.e. children's and families' right to day care for children under school age (2005). During her second period in office, this time a grand Christian and Social Democratic coalition, the Merkel–Gabriel federal government (2013) agreed to subsidise the regions to the tune of 15 billion euros for better public services, 6 billion euros for schools and universities, 5 billion euros for local welfare services and 4 billion euros for improved health care. All this in spite of all the pressures of globalisation, debt crises or the new ideological orientation elsewhere in Europe!

VII. CONCLUSIONS AND FUTURE PROSPECTS

All this contributes to uncertainty over the common basic values of Europe. As always, a period of transition is a difficult time to make realistic prognoses.

The tendencies around the common European standards of social security seem to be quite firm. Inclusion of everyone within mainstream society seems to define the absolute minimum level of income (50 per cent of net median) into the future. The difficult times in economies might lead to a rethink about what measures, in addition to cash benefit, could be considered as acceptable public support. Cash benefit must never be less than 40 per cent of the net median but last-resort social assistance could be supplemented by housing allowance, maintenance allowance, care allowances etc. and several types of public services could be supplied with a low fee or no fee for people on low incomes. But how are we to make an overall assessment? That might be one of the issues for future discussion.

The earnings-related standards of ILO Convention 102 and the European Code of Social Security, having remained the same for half a century, will be difficult to change to any direction. Also the case law of the European Court of Human Rights, which has after all been developing over some decades, might well remain stable, particularly with respect to protection of contributed social security as property.

The EU, however, is faced with a challenge in the light of Article 153 of the TFEU: how to define in a binding way the minimum standards of social transfer income in the Member States, which cannot be lower than the standards of the Council of Europe Treaties. The problem here is that the EU is not used to defining national social minimum standards or equal treatment of people other than those of migrant workers. Would the minimum transfer income and the current economic and social crises present the EU with the right issue and the right moment to raise its social profile? Time will tell.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

BIBLIOGRAPHY

European Committee of Social Rights (2008 and 2015), *Digest of the Case Law of the European Committee of Social Rights*, Strasbourg, Council of Europe Publications.

Harris, D and J Darcy (2001), *The European Social Charter*, 2nd edn, The Procedural Aspects of International Law Book Series, Vol. 25, Ardsley, NY: Transnational Publishers Inc.

Mikkola, M (2010), *Social Human Rights of Europe*, Helsinki: Legisactio.

Samuel, L (2002), *Fundamental Social Rights – Case Law of the European Social Charter*, 1st edn 1997 and 2nd edn 2002, Strasbourg: Council of Europe Publishing.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:27:02PM
via University College London (UCL)

8. Supervision of social security standards: Between law and politics

Tineke Dijkhoff

I. INTRODUCTION

Minimum social security standards have been created with the view to giving substance to the human right to social security. As such, these standards greatly contribute to social justice as a basis for lasting peace. At least, this is what we would wish and expect. In reality, we are often confronted with a discrepancy between the objectives of the standards and their actual effect. This discrepancy brings us to what is sometimes called the Achilles heel of international law: enforcement in the event of non-compliance.[1] The frequently quoted metaphor of the paper tiger missing in tooth and claw in relation to social rights speaks volumes;[2] member states can disregard negative conclusions of supervising bodies and go unpunished. This is not just an incidental circumstance; it is rather a conditional feature for states to be prepared to adopt international social security standards. It reflects the position of the standards: between soft and hard law.[3] Their soft character, however, does not mean that there is no supervision on their application. On the contrary, supervision of the standards involves advanced supervisory mechanisms with a wide range of different bodies, procedures and products, tailored to their in-between-position. These mechanisms are the subject of this chapter.

Minimum standards for the European region are laid down in the European Code of Social Security (European Code) and in Article 12 of the European Social Charter (Social Charter or ESC) of the Council of Europe. Although the European Convention on Human Rights (ECHR) also may play a role in the field of social security – through provisions such as the prohibition of discrimination and the protection of property – it does not contain concrete standards. It falls, therefore, outside the scope of this chapter. The European social security standards have been developed at the global level by the International Labour Organization (ILO) and first couched in ILO Convention No 102 on minimum standards of social security. This elaborate Convention covers nine social risks and forms the basis for standards subsequently adopted by both the ILO and the

[1] HG Bartolomei de la Cruz, 'International Labour Law: Renewal or Decline?' in B von Maydel and A Nußberger (eds), *Social Protection by Way of International Law; Appraisal, Deficits and Further Development* (Duncker & Humblot 1996) 24.

[2] B Hepple, 'Enforcement: The Law and Politics of Cooperation and Compliance' in B Hepple (ed), *Social and Labour Rights in a Global Context* (Cambridge University Press 2002) 238.

[3] F Pennings (ed), *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer Law International 2006).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Council of Europe.[4] Because all European countries are members of both organisations, they are requested to be part of the social security instruments of both organisations, covering largely the same standards – which many countries indeed are.[5] When a country has ratified the European Code and/or Article 12§2 of the ESC, it might as well ratify ILO Convention No 102, since compliance with the Council of Europe instruments implies compliance with Convention No 102. However, the ratification of different instruments – although they cover the same content – has as a consequence that the country concerned is subject to different supervisory procedures. This chapter aims to serve as a guide through these different systems.

Another objective of this contribution is to point out the various issues underlying the technical aspects of the supervision. The minimum standards may have remained largely the same since their codification in the mid-1900s – the world in which they have to be applied has changed significantly. Globalisation, the retreat of the state, the ascent of governance and soft law at various levels, and the rise of civil society are some – interconnected – examples of developments that have changed society, and will continue to do so. It is crucial that supervision of the standards is responsive to these developments and new societal realities in order to remain meaningful and to keep the standards alive. This is not an easy matter; not only because it is conceptually complicated to decide in what way supervision should be adapted to changes in society, but also because international organisations are unwieldy institutions by nature. With so many stakeholders representing different interests, institutional and procedural reforms are generally cumbersome exercises. This is especially true for the ILO, with its typical tripartite structure. The question may be raised whether the ILO and the Council of Europe are successful in keeping their supervisory systems responsive to the needs of present times. In this context, it is useful and necessary to critically examine the various procedures and the role of the supervisory bodies, the states parties and civil society organisations.

Such (re)consideration of the procedures and the position of the different parties is all the more important in view of the diffuse legal status of the conclusions of the supervising bodies. There is no doubt that the ESC, the European Code, and ILO Conventions are legally binding treaties once they have been ratified. This, however, does not automatically provide the supervisory bodies of these instruments with judicial or quasi-judicial status, nor does it make supervision a judicial process. Furthermore, where the separation of powers safeguards a necessary balance between the judiciary, the executive and the legislator in a democratic national legal order, this is quite different in the international arena, at least in the case of the ILO and the Council of Europe. A national court has the univocal task to judge whether the applicable legal

[4] For the content of the different instruments, see Chapter 7 in this volume; T Dijkhoff, *International Social Security Standards in the European Union. The Cases of the Czech Republic and Estonia* (Intersentia 2011) chapter 2; F Pennings and B Schulte, 'International Social Security Standards: An Overview' in F Pennings (ed), *Between Soft and Hard Law* (Kluwer Law International 2006) 1–26; JM Servais, *International Labour Law* (Kluwer Law International 2005).

[5] Twenty of the 47 Council of Europe member states have ratified Article 12§2 ESC, the European Code, and Convention No 102; 29 member states have ratified at least two of these instruments.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

norms have been (correctly) applied in the case under consideration; its decision is, in the end, final. A politically unwelcome decision cannot just be altered or ignored – it can only be remedied by changing the law through a democratic process. In contrast, the supervising expert committees of the Council of Europe and the ILO are part of a greater supervisory machinery in which also political bodies are involved. Although the expert committees are independent bodies, their conclusions may or may not be adopted by the organs that have decisive power regarding the follow-up of these conclusions; organs in which political interests are at stake. It is not surprising, therefore, that the outcomes of the supervisory procedures are sometimes viewed with scepticism and do not always yield the desired effect.

During the past decade, the supervisory mechanisms, the role and competence of the different supervisory bodies, and the various problems that hamper effective supervision in the 21st century, have been critically discussed in several studies.[6] Furthermore, interesting and instructive presentations on the subject have been given at two conferences held on the occasions of the 80th anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendation (Committee of Experts) in 2006 and the 50th anniversary of the ESC in 2011. The former, organised by the Labour Standard Department of the ILO, dealt expressly with the topic of international supervision. The proceedings of this conference provide a valuable collection of accounts and opinions as well as suggestions for improvement of the systems from prominent scholars, judges and officials of international organisations, including several (former) members of the ILO Committee of Experts.[7] The latter involved a seminar on the 'Reform of the European Social Charter', several contributions to which addressed the monitoring mechanisms and contained recommendations for more effective supervision.[8] This chapter embroiders on this literature.

The chapter is structured as follows. Sections II and III present a concise overview of the supervision procedures regarding the minimum standards under ILO Convention 102, the ESC, and the European Code, with reference to more elaborate sources. In the following sections, the roles of the different actors within these procedures are

[6] M Korda, *The Role of International Social Security Standards. An In-Depth Study through the Case of Greece* (Intersentia 2013); M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 107–121, 638–677; M Korda and F Pennings, 'The Legal Character of International Social Security Standards' (2008) 10(2) *EJSS* 131–158; T Dijkhoff and F Pennings, 'The Interpretation of International Social Security Standards' in F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters* (Intersentia 2007) 149–174; P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G De Búrca and B De Witte (eds), *Social Rights in Europe* (Oxford University Press 2005); R Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15(3) *EJI* 417–456; B Hepple, 'Enforcement: The Law and Politics of Cooperation and Compliance' in B Hepple (ed), *Social and Labour Rights in a Global Context* (Cambridge University Press 2002) 238–257.

[7] GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2007).

[8] N Johanson and M Mikkola (eds), *Reform of the European Social Charter*. Seminar Presentations delivered 8 and 9 February 2011 at the House of the Estates and the University of Helsinki, Helsinki (Ministry for Foreign Affairs of Finland 2011).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

discussed; subsequently the roles of the member states (Section IV), the international supervisory bodies (Section V), and civil society organisations (Section VI). Finally, Section VII provides concluding remarks and some ideas on how international supervision of social security standards could be improved.

II. PROCEDURES AND SUPERVISORY BODIES: THE ILO

II.i The Supervisory System of the ILO

The ILO's system of supervision has evolved over the years into an advanced system with a variety of stages and procedures, involving:[9]

- regular supervision procedure on the observance of obligations deriving from Conventions and Recommendations;
- representations on the observance of ratified Conventions;
- complaints on the observance of ratified Conventions;
- complaints on the infringement of freedom of association;[10]
- information on unratified (parts of) Conventions.

The main bodies involved in supervision are the Committee of Experts on the Application of Conventions and Recommendations (Committee of Experts) and the Committee on the Application of Conventions and Recommendations of the International Labour Conference (Conference Committee). This section gives a brief account of the relevant procedures;[11] a critical discussion follows in Sections IV to VI.

II.ii Government Reports on Ratified Conventions

According to Article 22 of the ILO Constitution, each member state is obliged to send annual reports to the International Labour Office (the Office) 'on the measures which it has taken to give effect to the provisions of Conventions to which it is a party'. The regular supervision procedure commences with the communication of these reports to the Office. Either beforehand or simultaneously, the government reports should be communicated to the representative organisations of employers and workers, which can

[9] For an elaborate account of the development of the system, see HG Bartolomei de la Cruz, G von Potobsky and L Swepston, *The International Labor Organization. The International Standards System and Basic Human Rights* (Westview Press Inc 1996) 67–124; See also V Leary, *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems* (Martinus Nijhoff Publishers 1982) 17–34; N Valticos, 'Fifty Years of Standard-Setting Activities by the International Labour Organization' (1996) 135(3/34) *International Labour Review* 409–414.

[10] Because this procedure is not applicable to social security standards it is left out of this account.

[11] ILO, *Handbook of Procedures Relating to International Labour Conventions and Recommendations* (ILO 2012); the annual reports of the ILO Committee of Experts, Part I; information on the website of the ILO www.ilo.org.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

make observations on the application of ratified Conventions (Article 23). In view of the increasing number of ratifications, leading to an excessive workload of the supervisory bodies and the governments, the reporting system has been modified several times in the course of time. These modifications have mainly involved a lowering of the reporting frequency. Since the last changes, which entered into force in 2012, the regular supervision procedure is as follows.

A distinction is made between 'detailed reports' and 'simplified reports'. Detailed reports must follow the form approved by the Governing Body for each Convention, indicating on which substantive provisions information has to be supplied. The form contains specific questions on matters such as: relevant legislation; permitted exemptions (e.g. as to categories of persons or economic activities); implementation of the Convention; enforcement; judicial or administrative decisions; general appreciation of the scheme(s) at stake; and observations by employers' and workers' organisations. The governments are also to provide information, if applicable, on the non-ratified parts of the Convention concerned. The first detailed report is due the year following the entry into force of a Convention for a particular country. Subsequently, member states must provide a detailed report at their own initiative in the case of significant changes or developments that affect the application of the Convention, for example the adoption of new legislation. Finally, the Committee of Experts or the Conference Committee may request a detailed report in their observations, direct requests or conclusions.

Simplified reports are automatically requested every three years for 12 Conventions that are considered to be fundamental or governance Conventions.[12] For the other Conventions, including those on social security, reports have to be submitted in a five-year cycle, according to their arrangement by subject matter. These reports may contain only: replies to the comments of the supervisory bodies; information on changes (not being significant) in legislation and practice affecting the application of the Convention; an indication of the employers' and workers' organisations to which the simplified reports have been communicated; and the observations of the employers' and workers' organisations as far as these have not been forwarded to the Office directly, and the comments of the governments on these observations. Unfortunately, none of the reports are published by the ILO.

II.iii Follow-up on the Reports

II.iii.a Committee of Experts on the Application of Conventions and Recommendations

The Committee of Experts examines the reports of the governments, and additionally makes use of other ILO bodies regarding, for example, technical cooperation activities. The Office plays a crucial role at this point by preparing comparative analyses of the countries' legislation and practice. It also formulates the legal questions relevant for the

[12] The Fundamental Conventions are on freedom of association and collective bargaining: Conventions 87 and 98; on abolition of forced labour: Conventions 29 and 105; on equality of opportunity and treatment Conventions 100 and 111; on child labour: Conventions 138 and 182. Governance Conventions: employment policy: Convention 122; labour inspection: Conventions 81 and 129; tripartite consultations: Convention 144.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

assessment of whether the member states' law and practice are in conformity with ratified Conventions. The Committee meets every year in November/December for 16 or 17 days. It is composed of 20 independent experts from different regions of the world, appointed – in a personal capacity – by the Governing Body for renewable periods of three years with a maximum of 15 years' service. For its work, the Committee has a qualified secretariat at its disposal. Its comments on the government reports take the form of 'observations' or 'direct requests'. Observations contain comments on fundamental issues, while direct requests relate to questions of a more technical nature or of lesser importance. If the Committee has found possible inconsistencies with the accepted standards, it may express its 'concern', or, in case of long-standing infringements, its 'deep concern'. Cases of progress are 'noted with interest'.

The findings of the Committee are published in a report submitted to the Governing Body, which forwards it to the Conference. The report consists of three parts:

Part I: A general report on the Committee's work, including specific matters that have been addressed by the Committee and an account of the extent to which member states have fulfilled their reporting obligations.
Part II: Observations concerning individual cases.
Part III: A General Survey on a specific subject determined by the Governing Body.

The entire report is published on the ILO website before the annual Conference takes place, usually in June each year. The direct requests are not included in the report, but are communicated directly to the governments concerned and entered in the NORMLEX database after being sent to the governments.[13]

II.iii.b Conference Committee on the Application of Standards

The Conference Committee consists of representatives of governments, employers and workers. During the meetings at the annual Conference, they examine the report of the Committee of Experts and government representatives have the opportunity to make a statement, for example by providing additional information or drawing attention to difficulties encountered in the fulfilment of their obligations. Following these examinations, the employer and worker members prepare together (i.e., without the government members) a list of individual cases in respect of which further discussion and additional information of the respective governments are desirable.[14] The Conference Committee, after having adopted the list, invites the representatives of the governments to discuss the observations in question, on the basis of which the Conference Committee makes comments. In the report of the Conference Committee, a summary of these discussions is included as well as the Committee's conclusions. The report also

[13] NORMLEX is a comprehensive database – launched in 2012 – providing open access to information on ILO international labour standards, comments of the ILO's supervisory bodies, and national labour and social security laws, accessible through the website of the ILO.

[14] ILO, *The Committee on the Application of Standards of the International Labour Conference. A Dynamic and Impact Built on Decades of Dialogue and Persuasion* (ILO 2011) 19–20.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

contains information on issues such as the failure to comply with reporting obligations, as well as on cases of progress or of specific interest. The report is submitted to the Conference and there discussed in plenary. It is subsequently published in the Record of Proceedings of the Conference, available on the ILO website.

II.iv Representations and Complaints

Apart from the regular procedure based on government reports, the ILO Constitution also provides for special procedures: representations (Article 24) and complaints (Article 26) regarding the observance of ratified Conventions. Representations can be made by employers' and workers' organisations (national and international) when they are of the opinion that a country has failed to secure the effective observance of a Convention to which it is a party. The representation must be communicated to the Governing Body, which decides on admissibility. If the representation is receivable, the Governing Body sets up a tripartite committee to examine the matter in closed session. The committee may request further information from the complainant organisation, communicate the representation to the government, and/or invite a representative of the complainant organisation and/or the government to make a statement on the matter. The conclusions and recommendations of the committee are sent to the Governing Body, which decides whether or not to publish the case in the Official Bulletin of the ILO, which is the most severe decision it can take. This measure is, however, seldom taken; in most cases the Governing Body decides that the government should continue to inform the Committee of Experts in its regular reports on the actions it has taken. The representations are not published. However, if the Governing Body decides that a representation is receivable and sets up a committee to examine the case, the final report of this committee is included in the NORMLEX database. So far, only one report has concerned a social security Convention, namely Convention No 102, relating to Peru.

The complaints procedure is more extensive and weighty. A complaint against a member state alleging that it has failed in the observance of a Convention can be filed by another member state when they have both ratified the Convention, or by the Governing Body. The Governing Body may do so either on its own account or on a complaint from a Conference delegate. The Governing Body then may appoint a Commission of Inquiry, which carries out an investigation in which it can involve other countries by requesting supplemental information. The Commission submits a report containing its findings and recommendations to the Governing Body and the governments concerned, whereafter it is published on the ILO website. The governments indicate whether they accept the recommendations or, if they do not, whether they wish to submit the case to the International Court of Justice, whose decision is final. If the country subject to the procedure does not solve the problems in accordance with the recommendations of the Commission or the conclusions of the Court within a defined period of time, the Conference can take measures to secure compliance. Both the complaints and the reports of the Commission of Inquiry are published. Up to 2014, the Article 26 complaints procedure has been used 29 times, no case has been brought

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

before the Court of Justice, and none of the cases has involved social security standards.[15]

II.v Government Reports on Unratified Conventions and Recommendations

In respect of unratified Conventions and of Recommendations, Article 19 of the Constitution requires member states to report 'at appropriate intervals as requested by the Governing Body, the position of its law and practice in regard to the matters dealt with in the Convention'. For this purpose, the Governing Body annually chooses instruments on a subject of current interest to be addressed by the member states. The Committee of Experts composes an in-depth General Survey on this subject on the basis of the reports of the governments and information provided by the employers' and workers' organisations. These Surveys are used to examine the impact of Conventions and Recommendations, to analyse the difficulties indicated by governments as impeding their application, and to identify means to overcome these obstacles. They often lay a basis for new standards or promotional activities. In accordance with the ILO Declaration on Social Justice for a Fair Globalisation of 2008, the themes of the General Surveys coincide with the annual strategic objective of the ILO. The General Survey of 2011 dealt with the social security instruments.[16] In this Survey attention was drawn to the various deficits in social protection that the up-to-date social security instruments do not address. It provided, among other things, substantial input for the formulation of Recommendation No 202 on national social protection floors adopted in 2012 and for proposals to adapt the social security Conventions in order to resolve gender-sensitive language issues and to better safeguard gender equality.

III. PROCEDURES AND SUPERVISORY BODIES: THE COUNCIL OF EUROPE

III.i The Supervisory System of the Council of Europe

There is a close connection between the ILO and Council of Europe social security instruments; the European Code is the European spitting image of ILO Convention No 102 and Article 12§2 of the Social Charter requires compliance with Convention No 102 and the European Code respectively.[17] Since most European countries that have accepted the Council of Europe standards are also part of ILO Convention No 102, supervision of the Council of Europe standards takes place in cooperation with the

[15] NORMLEX database, search in Comments by the Supervisory Bodies, Complaints/Commissions of Inquiry (Art 26); F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters* (Intersentia 2007) 144.

[16] ILO, *General Survey Concerning Social Security Instruments in Light of the 2008 Declaration on Social Justice for a Fair Globalisation* (ILO 2011).

[17] Article 12§2 of the European Social Charter of 1961 requires compliance with ILO Convention No 102, whereas the Revised European Social Charter of 1996 refers to the European Code.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

ILO.[18] In fact, in respect of the content, the Council of Europe supervising bodies rely heavily on the examinations of the ILO Committee of Experts. The idea behind this close cooperation is to safeguard impartial supervision by an independent body and to ensure uniformity in the interpretation and application of the different instruments containing almost the same content.[19] Still, the cooperation between the international bodies does not waive any state obligations flowing from overlapping supervisory systems. This means that a breach of a certain standard by a country that is part of ILO Convention No 102, the European Code and Article 12§2 of the Social Charter will be regarded in relation to all three instruments and the country must give account of their follow-up under each procedure.

The following Council of Europe procedures regarding social security standards exist:[20]

European Code – Regular supervision procedure; supervisory bodies: ILO Committee of Experts, Governmental Committee, Committee of Ministers.

Social Charter – Regular supervision procedure; supervisory bodies: European Committee of Social Rights, Governmental Committee, Committee of Ministers; supervisory bodies: European Committee of Social Rights, Committee of Ministers.

III.ii Supervision of the European Code of Social Security

III.ii.a Government reports

Similar to the ILO procedure, supervision commences with the requirement of governments to submit reports on the application of the Code, containing information on the relevant regulations supplemented with statistical evidence, in order to prove compliance. The frequency is, however, much higher, as reports have to be established annually.[21] In 1980 it was decided to bring the reporting requirements more in line with the ILO system by requesting detailed reports every four years – which was changed to a five-year cycle as of 2003. In between, the reports may be limited to general information on the development and amendments of social security regulations and specific information requested in pursuance of the previous report. In practice, countries that are also part of Convention No 102 usually submit the same report to both the ILO and the Council of Europe. The government reports are not published.

---

[18] Thirty-three of the 47 Council of Europe member states have ratified either the European Code or Article 12§2 ESC or both, 5 of which have not ratified ILO Convention No 102.

[19] A Otting, *The Monitoring of the Application of the European Code of Social Security and its Protocol* (Freiburg 2010) 78.

[20] Council of Europe, *Rules of Procedures of the Governmental Committee of the European Social Charter and the European Code of Social Security*, adopted 27 March 2012; A Otting, *The Monitoring of the Application of the European Code of Social Security and its Protocol* (Freiburg 2010) 78; information on the website of the Council of Europe <www.coe.int>; J Nickless, *European Code of Social Security. Short Guide* (Council of Europe 2001).

[21] Article 74 of the European Code. Article 76 requires biannual reports on the non-accepted parts.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

III.ii.b No communication to the social partners

Remarkably, the European Code does not require the governments to communicate their reports to the employers' and workers' organisations. The absence of a national control mechanism may, obviously, affect the quality of the information received by the supervisory bodies. This shortcoming was repaired with the revision of the Code in 1990; however, for the Revised European Code to enter into force it needs to be accepted by two countries, whereas only the Netherlands has ratified it so far. It is true, however, that the Council of Europe supervising bodies have the comments of the social partners on ILO Convention No 102 at their disposal and they actually use these comments in connection with the reports on the Code. This, of course, only counts when a country has ratified both instruments. In the event a country has not ratified Convention No 102 but has accepted both the Code and Article 12§2 of the Social Charter, the social partners have the opportunity to submit their comment under the Social Charter procedure.[22]

III.ii.c Supervising bodies

On receipt of the government reports by the Council of Europe Secretary General, it forwards them to the ILO Committee of Experts for examination. The coordination between these two international organisations is underlined by the presence of an official of the Council of Europe at the concluding session of the ILO Committee of Experts. Since 2012, the reports and the conclusions of the ILO Committee of Experts have been examined by the Council of Europe 'Governmental Committee of the European Social Charter and the European Code of Social Security' (Governmental Committee), in which meetings ILO representatives are regularly present.[23] The Governmental Committee is composed of a senior official from the social or employment ministries of each member state that is part of the Social Charter and/or the European Code; however, for the performance of duties related to the Code, the representatives of the countries that are only part of the Social Charter participate as observers.[24] Furthermore, representatives of the European social partners may also participate as observers.

The Committee discusses, in particular, the cases in which the ILO Committee of Experts has expressed its concern. During the discussions, the representatives of the states concerned have the opportunity to add information and to explain how and when the compliance deficiencies will be rectified. The Governmental Committee drafts its own conclusions for each member state and submits its report to the Committee of Ministers. The Committee of Ministers decides whether they consider the social security systems of each member state to be in compliance with the standards established by the Code. The decisions take the form of resolutions, which are published on the website of the Committee of Ministers.[25] If it is decided that a member state does not comply, the government will be asked by way of the resolution

[22] This currently concerns only one country (Lithuania).

[23] Until 2012, this was performed by the Council of Europe Committee of Experts on Social Security (CS-SS), see III.ii.d.

[24] This currently concerns six countries.

[25] The resolutions are coded as CM/ResCSS(YEAR)No.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

to bring its legislation and practice into conformity with the obligations following from the Code.

Although the European Code is the main social security instrument of the Council of Europe, the visibility of the results of the supervisory procedure is poor. The conclusions of the Governmental Committee and the resolutions and recommendations of the Committee of Ministers are not entered in a comprehensive database with search functions and not even published on the (poorly maintained) website of the European Code. Moreover, the reports of the ILO Committee of Experts and the possible comments of social partners are not published at all. This lack of transparency and visibility is detrimental to the effectiveness and credibility of the procedure as such as well as of the outcomes. In terms of the furtherance of social security, this is a missed opportunity; all the more since the Code is, in fact, the most concrete and univocal instrument on social security adopted by the Council of Europe. Another unique feature of the Code is the annual reporting cycle – instead of the four- and five-year cycles for the Social Charter and Convention No 102 respectively – which allows for prompt actions in response to identified problems.

III.ii.d The discontinuation of the Committee of Experts on Social Security

Until 2012, the reports of the ILO Committee of Experts on the application of the European Code were examined by the Council of Europe Committee of Experts on Social Security (CS-SS). The CS-SS was composed of senior national officials in the field of social security; thus, whereas the members were social security experts, it was not an independent body like the ILO Committee of Experts. As part of a structural reform at the Council of Europe, adopted in 2011, the CS-SS and the Governmental Committee on the European Social Charter were merged,[26] although it would be more appropriate to say that the CS-SS was incorporated into the Governmental Committee. This merger was prompted by budgetary reasons but it was also argued to further consistency in the supervision of the two instruments.[27] The latter argument, however, would rather substantiate a merger with the European Committee of Social Rights since that is the expert committee that would be able to safeguard consistent interpretations of the two instruments. The Governmental Committee does not necessarily consist of social security experts and its main task is not to evaluate the findings of the ILO Committee of Experts, but merely to reach consensus on the follow-up of these findings and the wordings of the conclusions. It is not very obvious in what way the abolishment of the supervisory expert committee would contribute to consistency in the supervision of the two instruments.

The abridged report of the last meeting of the CS-SS conveys that the merger 'provoked much discussion by delegations' and that the delegates 'expressed concern at the way in which supervision of the Code would continue in future, and about the prospects for the activities to promote social security within the Council of Europe'.[28] The full merits of the discussion have not been reported, but the concern of the committee members may be exemplified by the reduction of the meeting time; whereas

[26] Information Document SG/Inf(2011)9 FINAL 7.
[27] Council of Europe, *Explanatory note on the proposed merger*, SG/Inf(2011)9 Rev.
[28] CM(2011)86, 6 June 2011.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

the CS-SS met three days yearly, the meetings of the Governmental Committee have only been extended by one day, which is reserved for the European Code.[29] The merger seems to place the European Code rather in the shadow of the Social Charter and it is likely that it will further affect the visibility and promotion of the Code. In fact, since the merger, the website of the European Code has not been kept up to date but refers to the website of the Social Charter, where, however, any reference to the European Code is missing. It could be argued that the Code may also reap certain benefits from a closer association with the Charter – provided that the association were made apparent. Such positive effect would, however, be more likely in the case of a merger with the Committee of Social Rights than with the rather indistinctive Governmental Committee.

III.ii.e The isolated route of the Revised European Code revisited

The Revised European Code sets out a different procedure in so far as it does not provide for the examination of the government reports by the ILO Committee of Experts.[30] Instead, the Revised Code requires the setting up of an independent Commission consisting of not more than five experts in social security participating in an individual capacity, nominated by the Secretary General of the Council of Europe. The ILO shall be invited to send a representative to participate in the Commission meetings in a consultative capacity. The reports containing the conclusions of this Commission shall be examined by a special committee designated by the Committee of Ministers in order to prepare its own conclusions for the Committee of Ministers, by analogy with the Governmental Committee. However, these conclusions must first be sent to the Parliamentary Assembly for an opinion before the Committee of Ministers confirms by resolution whether or not the contracting countries comply with their obligations. This isolated procedure no longer safeguards a uniform interpretation of the minimum standards. It is for this reason, and probably also for budgetary reasons, that it was proposed within the framework of the structural reform in 2011 to change this procedure, even before it had entered into force. The idea is now to create, in the event that the Revised Code is ratified by a second state, 'synergies with the European Committee of Social Rights … of the Charter'.[31] This would also bring the ILO Committee of Experts on board again.

III.iii Supervision of the European Social Charter

III.iii.a The reporting procedure

There are two supervision routes regarding the Social Charter: the reporting procedure and the collective complaints procedure.[32] Under the current reporting system, last

---

[29] Council of Europe, *Explanatory note on the proposed merger*, SG/Inf(2011)9 Rev.

[30] European Code of Social Security (Revised), Article 79.

[31] Council of Europe, *Explanatory note on the proposed merger*, SG/Inf(2011)9 Rev.

[32] Council of Europe, *Rules of the European Committee of Social Rights*, adopted on 29 March 2004 and last revised on 12 September 2013; Council of Europe, *Rules of Procedures of the Governmental Committee of the European Social Charter and the European Code of Social Security*, adopted 27 March 2012; M Mikkola, *Social Human Rights of Europe* (Karelactio

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

amended in December 2013, the provisions of both the Social Charter of 1961 and the Revised Charter are divided into four thematic groups. Member states submit their report on the provisions relating to one of the thematic groups on an annual basis, which means that each provision of the Charter is reported on once every four years. Article 12 is categorised in group 2 covering health, social security and social protection; reports on the previous four years in this group are due in October 2016, 2020, etc, whereas the conclusions of the supervision are scheduled in December of the following year. Thus, in December 2017 the conclusions on the period covering 2012–2015 will be adopted and publication will take place in January 2018. Unlike the government reports on the ILO Conventions and the European Code, the reports on the application of the Social Charter are published on the website of the Council of Europe/European Social Charter. However, where applicable, regarding Article 12§2 governments just refer to their reports on the European Code (which are not published), which means that only the reports on Article 12§2 of the four member states that have not also ratified the Code can actually be consulted.

It is the task of the European Committee of Social Rights to examine the reports and to judge whether member states are in conformity with the provisions of the Social Charter in law and in practice. The Committee is composed of 15 independent experts (until 2001 their number was nine), elected by the Committee of Ministers for a six-year term, renewable once. Five-day meetings take place seven times a year. For the assessment of Article 12§2, the Committee makes use of the reports of the ILO Committee of Experts on the application of ILO Convention No 102 and the European Code. In the few cases that a country is not part of one of these instruments, the Committee of Social Rights assesses the reports itself. The Committee's findings are laid down in conclusions, which are sent to the governments concerned and immediately thereafter made public. Two kinds of conclusions may be drawn by the Committee: a conclusion of conformity or of non-conformity. Furthermore, the Committee may decide to defer its conclusion and require additional information. Since 2009 it has been the practice of the Committee to adopt a conclusion of non-conformity if the requested information is not provided in the following reporting cycle. All conclusions are published on the website of the Social Charter and – with considerable delay – included in the Case Law Database on the website of the Committee of Social Rights.[33] Apart from conclusions, the Committee also adopts 'statements of interpretation' through which it develops the meaning and scope of the Charter provisions. A summary of the main findings is included in the Committee's annual Activity Reports.

The conclusions of the Committee of Social Rights are examined by the Governmental Committee, which considers the follow-up to be given to the conclusions and

2010) chapters I.3 and VI.2; P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G De Búrca and B De Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 45–67.

[33] This European Social Charter Document Collection (Hudoc database) comprises most published documents regarding the supervision of the Social Charter and has some search functions.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

prepares resolutions for the Committee of Ministers.[34] A conclusion of non-conformity may lead to a recommendation of the Committee of Ministers to the state concerned in which it invites the government to provide information in its next report on the measures it has taken to bring the situation into conformity with the Charter. In practice, this only happens if the representative of the state concerned has not been able to convince the other members of the Governmental Committee and/or the Committee of Ministers that action has been taken or will be taken with a view to rectifying the violation. As a result, very few of the negative conclusions are actually transposed into a recommendation.[35] In fact, relating to Article 12, the Case Law Database shows 125 cases of non-conformity from 2000 to 2010 but not a single recommendation. This poor follow-up on established violations of the Social Charter clearly illustrates the diverging agendas of an independent expert committee and a political body. This discord will be further discussed in section V.

III.iii.b Collective complaints procedure

The Additional Protocol on Collective Complaints was adopted in 1995 and entered into force in 1998.[36] Complaints about an unsatisfactory application of provisions of the Social Charter may be lodged by international organisations of employers and trade unions, employers' organisations and trade unions in the country concerned, and by international non-governmental organisations.[37] At the time, there was no political will to adopt an individual complaints procedure as it exists for the European Convention on Human Rights.[38] After having received a complaint, the Committee of Social Rights first decides whether the complaint is admissible; if so, the decision is transmitted to all member states that have accepted the complaints procedure, and, together with the case documents, is published on the website of the Charter. The country concerned is invited to make written submissions on the complaint, on which the complaining organisation may submit a written response. The President of the Committee of Social Rights can decide to additionally invite third parties to comment on the case. The Committee then decides, at the request of one of the Parties or on its own initiative, whether or not it is

---

[34] The reports of the Governmental Committee, including a brief account of the discussions on conclusions of non-conformity, are published on the Social Charter website (under The Reporting Procedure → Governmental Committee).

[35] M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 116.

[36] Currently 15 member states have accepted the Protocol.

[37] Seventy-eight INGOs are granted the participatory status with the Council of Europe necessary for lodging an admissible complaint (situation as of January 2014). Member states may also accept that national NGOs can lodge a complaint, but so far this possibility has only been accepted by Finland. For detailed information on the complaints procedure and the admissibility criteria, see: Council of Europe, *Rules of the European Committee of Social Rights* Part VIII; European Social Charter website; AM Swiatkowski, 'The European Committee of Social Rights and the Collective Complaints Procedure under the European Social Charter' in GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2007) 37–48.

[38] A Otting, *The Monitoring of the Application of the European Code of Social Security and its Protocol* (Freiburg 2010) 75; R Churchill and U Khaliq, 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' (2004) 15(3) *EJI* 424.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

appropriate to hold a public hearing. The final decision of the Committee on the complaint is forwarded to the parties to the procedure and to the Committee of Ministers, and must be published within four months after its transmission to the Committee of Ministers. The Committee of Ministers adopts a resolution referring in general wordings to the findings of the Committee of Social Rights. In the case of a negative decision of the Committee of Social Rights, it may also issue a recommendation to the effect that the state concerned must take appropriate action to remedy the situation. This, however, happens only occasionally and has never concerned Article 12.

IV. THE DECISIVE ROLE OF THE STATE

IV.i Fields of State Action

The ILO and Council of Europe social security instruments depend first and foremost, for their effectiveness, on the measures actually taken by the member states. Their key role comprises at least the following fields of action:

- active appreciation of the standards;
- establishing willingness to be bound by the standards;
- ensuring compatibility of current legislation with the standards;
- ratification of the standards;
- ensuring compatibility of new legislation with the standards;
- compliance with the reporting obligations;
- participation in the various meetings and committees.

IV.ii Alarming Compliance Rates

The fact that ratification of the treaties is entirely based on the state's consent to be bound could raise the expectation that states generally acquit themselves of their duties flowing from their voluntary ratification. From the comments of the supervising bodies we know, however, that this is anything but true. For example, of the 121 conclusions on the four paragraphs of Article 12 that the Committee of Social Rights adopted in 2009, 43 per cent involve conclusions of non-conformity and 22 per cent deferrals.[39] This leads to the alarming finding that in two-thirds of the cases it could not be established that the legislation actually met the ratified standards. It has not always been like that. As Table 8.1 shows, until the reporting cycle of 2004 covering the years 2001 and 2002, the conformity rate of Article 12 had been rather stable at around 65 per cent for more than a decade, and was also higher than the conformity rate of the ESC in total. This has become the other way around as of the reporting cycle of 2004, which shows a drop of conformities in general, but especially regarding Article 12.

[39] Case Law Database of the Committee of Social Rights, available on the Council of Europe website, see Table 8.1. It should be noted that the Database is not completely accurate and sometimes deviates from the data included in the Activity Reports of the Committee.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Table 8.1 Conclusions of the Committee of Social Rights on Article 12 and on all articles of the ESC and the ESC (Revised) since 1969

Year/reporting cycle ESC*	Conformity %			Non-conformity %			Deferral %		
	Art. 12§2	Art. 12	ESC*	Art. 12§2	Art.12	ESC*	Art. 12§2	Art. 12	ESC*
2013 / XX	78	41	49	4	46	32	18	13	19
2009 / XIX	67	35	49	11	43	29	22	22	22
2006 / XVIII	72	43	50	0	36	27	28	21	23
2004 / XVII	81	48	*52*	0	28	*22*	19	24	*26*
2002 / XVI	86	62	**	0	25	**	14	13	**
XV (2000)	*90*	*63*	*59*	*0*	*20*	*23*	*10*	*17*	*18*
XIV (1998)	*94*	*66*	*57*	*0*	*11*	*18*	*6*	*23*	*25*
XIII (1993–1997)	*90*	*67*	*55*	*0*	*3*	*11*	*10*	*30*	*34*
I-XII (1969–1992)	*88*	*82*	*67*	*3*	*11*	*18*	*9*	*7*	*15*

Notes:
This table includes conclusions on the application of both the ESC (1961) and the ESC (Revised) (1996). It is partly based on a summary of the conclusions and other information included in the Activity Reports of the Committee of Social Rights (as of 2002), and partly on the Case Law Database which has a search function on 'conformity', 'deferral', and 'non-conformity'. However, because this search function includes only a (substantial) part of the conclusions, the percentages based on the database are to be considered as indications rather than exact numbers; they are presented in italic type. The conclusions on the ESC (1961) are numbered in Roman characters according to the reporting cycle; those on the ESC (Revised) (conclusions as of 2002) make reference to the year in which the conclusions have been adopted.

* Average percentages relating to all articles of the ESC (1961), the additional Protocol, and the ESC (Revised).
** The search function of the database does not cover a representative number of conclusions for this reporting cycle.

IV.iii Reasons for the Increasing Compliance Deficit

The 'compliance crash' regarding Article 12 can be attributed in large part to a decrease in positive conclusions regarding Article 12§1: from 21 out of 24 in 2002, to 13 out of 25 in 2004. An important reason for this downgrade is that for the conclusions of 2004, the Committee of Social Rights started to develop an interpretation of Article 12§1 that considerably extended member states' obligations. The provision reads that the Parties must 'establish or maintain a system of social security'. The Committee's interpretation of this paragraph was based on the idea that a social security system is adequate only if it prevents beneficiaries from falling below the poverty threshold, defined as 50 per cent of median equivalised income and as calculated on the basis of the Eurostat

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

at-risk-of-poverty threshold value.[40] The Committee consequently concluded in five cases that certain benefits were below the poverty threshold and, therefore, manifestly inadequate, and in seven cases it decided to defer its conclusion in order to allow the member states to prove that their legislation was in line with this provision. In 2006, however, 16 out of 29 member states received a negative conclusion and only five received a conclusion of conformity, while in 2009 the Committee issued only one single conclusion of conformity against 25 of non-conformity.[41] Apparently, member states are not prepared to remedy the situation and this development strongly suggests that they do not accept the Committee's broad interpretation of this provision.

Still, the interpretations of the Committee of Social Rights cannot solely be held responsible for the decline in conformities. Table 8.2 includes only the conclusions on Article 12§2, the assessment of which is based on the findings of the ILO Committee of Experts, which interpretations have not undergone noticeable changes. It shows a drop of the conformity rate of this provision as well, although less dramatically.

There are several other reasons that might have contributed to the downward trend. The second reason relates to the accession to the ESC by Eastern European countries after the collapse of the Soviet Union. Ratification of the ESC was heavily advocated by the Council of Europe and considered a necessary step for EU accession.[42] However, these new member states have received relatively many deferrals and conclusions of non-conformity on their first reports, and their poor compliance rates have not significantly improved in the subsequent reporting periods. In fact, non-compliance by new states parties appears to have become a structural problem. According to the 2009 conclusions, not one of the four countries that had to submit their first reports after ratification of the ESC complied with the accepted parts of Article 12.[43] This raises serious questions about the admission to the ratification procedure. The Charter is open for signature and ratification by all Council of Europe member states and they are expected to carry out their own verification of which obligations they can undertake. Supervision by the Charter mechanism only takes place *ex post*. In view of the poor compliance rates of new parties to the Charter, it might be expedient for the Council of Europe to consider an *ex ante* examination as part of the ratification procedure.

---

[40] See, for example, Committee of Social Rights, *Conclusions 2004 Volume 1, Estonia*, Article 12§(1); Committee of Social Rights, *Conclusions XVIII-1 Volume 1*, Czech Republic, Article 12§(1).

[41] Questions about the legitimacy or advisability of the Committee's interpretation will be discussed in the next section.

[42] T Dijkhoff, *International Social Security Standards in the European Union. The Cases of the Czech Republic and Estonia* (Intersentia 2011) 114, 203.

[43] Andorra accepted in 2004 all parts of Article 12, non-compliance with sub 1, 2, 4, compliance with sub 3; Armenia accepted in 2004 Article 12 sub 1 and 3, non-compliance; Georgia accepted in 2005 Article 12 sub 1 and 3, non-compliance with sub 1, deferral of sub 3; the former Yugoslav Republic of Macedonia accepted in 2005 all parts of Article 12, non-compliance with sub 1, deferral of sub 2, 3, 4.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Table 8.2 Conclusions of the Committee of Social Rights on Article 12§2 of the ESC and the ESC (Revised) since 1969

Year/reporting cycle covering Art. 12§2	Number of MSs accepted Art. 12§2	Number of conclusions on Art. 12§2	Conformity number	Conformity %
2013/XX	27	27	21	78
2009/XIX	27	27	18	67
2006/XVIII	25	25	18	72
2004/XVII	21	21	17	81
2002/XVI	21	21	19	90
XV (2000)	18	18	16	89
XIV (1998)	17	17	16	94
XIII (1993–1997)	13	20	18	90
XII (1991–1992)	12	12	12	100
XI (1991–1992)	12	12	12	100
X (1987–1990)	12	12	11	92
I–IX (1969–1986)	5–10	71	59	83

Note: This table includes all conclusions on the application of both the ESC (1961) and the ESC (Revised) (1996) relating to Article 12§2, based on reports of the Committee of Social Rights and the Case Law Database.

A third explanation for the decreasing compliance rates might be of an economic nature. The Committee of Social Rights noted in 2009 that '[T]he severe financial and economic crisis that broke in 2008 and 2009 has already had significant implications on social rights, in particular those relating to the thematic group of provisions Health, social security and social protection of the current reporting cycle.'[44] Tables 8.1 and 8.2, however, substantiate this argument only for a small part, showing that the compliance crash regarding Article 12 had convincingly set in even in times of economic prosperity. Furthermore, the conclusions of 2013 on the period 2008–2011 are even a bit more positive than those covering the pre-crisis period.

The fourth reason is a political one. It seems that the increasing negligence of international social security standards goes hand in hand with a shift towards more economic liberalisation policies in many European countries. The decreasing compliance rates reflect common trends in politics such as the retreat of governments and the growing emphasis on free market forces, privatisation and self-responsibility.[45]

[44] European Committee of Social Rights, *European Social Charter (Revised). Conclusions 2009 – Volume 1* (Council of Europe 2010) 12.

[45] Chapter 7, section VII of this volume.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

IV.iv The Undermining Effect of Political Ambivalence

Irrespective of its causes, the compliance crash in any case indicates that where national political interests oppose international legal obligations, the latter come off worst. It is clear that the interest of states parties in fulfilling international obligations is waning. This lays bare the ambivalent political agendas of states parties, accepting treaty provision on the one hand, but not accepting the legal consequences of their acts on the other hand. The half-hearted attitude of member states towards their international obligations becomes visible at other points as well. For example, many country reports regarding both Council of Europe and ILO treaties are of low quality in that they are excessively lengthy, not complete, contain outdated information, or do not adequately address the questions.[46] Furthermore, the possibility for ILO member states to lodge a complaint against another country is hardly used. Since 1934 only 10 complaints regarding Convention No 102 have been lodged by individual countries or by a number of delegates of the Conference against another country, none of which concern a European member state.[47] This in spite of the fact that the follow-up on recommendations, requests, resolutions or conclusions of the supervising bodies leaves a lot to be desired. In fact, as a former vice-president of the Committee of Social Rights carefully noted, 'decisions of the committees are often faced with the stubbornness of certain governments',[48] and this is no different from the situation within the ILO.[49] A complicating factor is that the conclusions of the independent expert committees must be asserted by political bodies in which the criticised states parties take part; this area of tension will be further discussed in Section V.

Considering the fact that the standards can only be effective if they are properly implemented by the states parties, this account of the member states' position towards their legal obligations is, to put it mildly, worrisome. The lack of political will to ensure compliance with ratified standards badly affects the effectiveness of the instruments as well as the credibility of the supervising bodies. Furthermore, Table 8.1 shows that among the social rights, the fundamental right to social security is currently the most likely to be violated. The flagrant and sustained cases of non-compliance and indifference regarding the reporting duties show the weakness of the supervisory system. At the same time, how would international supervisory bodies be able to cope with political unwillingness and indifference of the states parties? Apparently, it is politically attractive to be part of the treaties, but not to subsequently implement them in a proper manner. This discrepancy calls for serious political consideration and for further research on the exact reasons and possible responses.

---

[46] P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G De Búrca and B De Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 51; M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 115.

[47] NORMLEX, *Information System on International Labour Standards*, available at the ILO website.

[48] GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2007) 127.

[49] T Dijkhoff and F Pennings, 'The Interpretation of International Social Security Standards' in F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters* (Intersentia 2007) 151–152.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

V. THE SUPERVISING BODIES: ACTING BETWEEN LAW AND POLITICS

V.i The Soft Approach

Taking into account the great number of violations, it must be faced that the supervisory systems do not lead to compliance with the international obligations in many cases, and especially not when the minimum social security standards are at stake. This observation touches on the already mentioned criticism regarding ILO and Council of Europe standards, namely that they are paper tigers that do not bite due to the absence of a court that has the power to impose sanctions. The absence of a court may indeed hamper the effectiveness of the respective instruments. Nußberger remarked in this respect that there are examples of long standing infringements commented on for many years by the ILO Committee of Experts, which were then remedied after one single judgment of the European Court of Justice.[50] It should be noted, however, that the European Court of Justice is a supranational court, whereas the ILO and the Council of Europe are mere international organisations with entirely autonomous member states.

More appropriate would be a comparison with the European Court of Human Rights (ECtHR). There are cases indicating that decisions of this Court are indeed more effective than those of the Committee of Social Rights, for example *Sørensen and Rasmussen v Denmark*.[51] The Committee of Social Rights had for years condemned the existence of 'closed shops' in Denmark without effect, while after the decision of the ECtHR the Danish government immediately solved the problem. Furthermore, it has been found that states tend to attribute important influence to the case law of the ECtHR in general.[52] Still, it must be conceded that the just satisfaction records of the Court are not very rosy either. For example, in 2012, in almost half of the cases in which the Court had imposed just satisfaction payments, these were not paid in time.[53] Such figures may put the legal power of an international court into perspective. It should also be kept in mind that the ILO Constitution does provide for the possibility to start a procedure at the International Court of Justice. The fact that this has never been used so far indicates that the presence of a court as such does not solve all compliance problems; to be effective, the availability of a court should go hand in hand with accessible complaints procedures, preferably including individual complaints.

---

[50] F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters* (Intersentia 2007) 143.

[51] *Sørensen and Rasmussen v Denmark* App nos 52562/99 and 52620/99 (ECHR, 11 January 2006).

[52] See for example B de Mars, D Pieters and P Schoukens, '"Security" as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects' in U Becker et al (eds), *Security as General Principle of Social Security Law in Europe* (Europe Law Publishing 2010) 621.

[53] Council of Europe, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 6th Annual Report of the Committee of Ministers 2012* (Council of Europe 2013) 59.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Although it is clear that it would certainly strengthen the power of the European Social Charter if it were to provide for a court – as does the European Convention on Human Rights – a discussion about the advantages of a court is not very relevant or constructive. After all, the Council of Europe member states have deliberately chosen the soft approach in respect of social rights and in the light of the many compliance problems it is not likely that their position at this point will change in the near future. On the contrary, it has been asserted repeatedly that the main purpose of the supervisory procedures is not to sanction governments that fail to comply with their obligations, but rather to establish a dialogue in order to help governments to overcome their implementation difficulties.[54] Therefore, it is more constructive to try to identify at what points the soft supervisory system could gain in strength and how it could better respond to the waning political interest of states parties in preventing and rectifying violations. After all, either in the hard way or in the soft way, what matters is that the standards are applied.

V.ii Independent Experts under Political Constraints

V.ii.a Political tolerance for infringements creates a credibility deficit

As discussed previously, two kinds of supervisory bodies can be distinguished: independent expert bodies (the Council of Europe Committee of Social Rights and the ILO Committee of Experts) and political bodies, the latter consisting of representatives of member states, and, in the case of the ILO, employers' and workers' organisations. Since the expert committees depend for the follow-up of their conclusions on the political bodies – notably the Council of Europe Committee of Ministers and the International Labour Conference respectively – it is important to look at the role and competence of the different bodies and the interplay between them. Regarding the Council of Europe, it has been noted that the working relationship between the Committee of Social Rights and the Committee of Ministers is not exactly optimum.[55] Their different agendas become visible through the fact that only a very small part of the negative conclusions of the Committee of Social Rights are translated into actual recommendations by the Committee of Ministers; more than 80 per cent of these cases are 'solved' at the meetings of the Governmental Committee, and of the remaining 20 per cent many are waived by the Committee of Ministers, even in the case of long-standing violations.[56] This high level of tolerance towards infringements of the Social Charter by the political bodies undermines the credibility of the Committee of Social Rights and the authority of its conclusions, at least on the part of the governments. The fact that not one recommendation has followed the 35 non-conformity conclusions on Article 12 adopted in 2009,[57] does not give the impression that the ministers take the obligations seriously. Their mutually forbearing attitude will

[54] A Otting, *The Monitoring of the Application of the European Code of Social Security and its Protocol* (Freiburg 2010) 77.

[55] J Petman, 'Final Remarks & Conclusions' in N Johanson and M Mikkola (eds), *Reform of the European Social Charter* (Ministry for Foreign Affairs of Finland 2011) 42.

[56] M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 116–117.

[57] Case Law Database of the Committee of Social Rights.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

certainly not arouse member states' actions to rectify the identified flaws in their legislation or practice.

Another point of potential political influence concerns the competence of the Committee of Ministers to elect the members of the Committee of Social Rights and to decide on their possible second term.[58] The actual danger of the politicisation of supervisory bodies may be exemplified by the abolition of the UN Commission on Human Rights in 2006. As UN Secretary-General Kofi Annan stated in this respect: 'The Commission's capacity to perform its tasks has been increasingly undermined by its declining credibility and professionalism. In particular, states have sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit has developed.'[59] Perhaps the involvement of the Parliamentary Assembly as is foreseen in the Revised European Code (Section III.ii.e) would be a good idea to curb political opportunism.

V.ii.b ILO supervisory system in crisis

The situation is a bit different at the ILO. Because of its tripartite structure, governments do not have the power to determine the follow-up on the observations of the Committee of Experts – this is rather a matter of the tripartite Conference Committee on the Application of Standards (Conference Committee) and, in the end, the Conference, which has to adopt the report with the conclusions of the Conference Committee. That the highly praised tripartite structure does not prevent any deadlock proves, however, the occurrence of a crisis within the Conference Committee in 2012.[60] This crisis has severely affected the whole supervisory mechanism. What happened was that the employer members of the Conference Committee did not agree with the – long-standing – interpretation of the Committee of Experts regarding Convention No 87 involving the recognition of the right to strike, which was included in its General Survey of that year on the fundamental Conventions. In preparation for the 2012 Conference, the Committee of Experts had made several observations on individual countries in line with this interpretation. The employer members were not happy with this and argued that it was not the mandate of the Committee of Experts to interpret Conventions and that its reports were in no way agreed or authoritative texts of the ILO tripartite constituents.[61] Subsequently, at the Conference Committee meeting in which the 'list of individual cases' should have been adopted, none of the employer members

---

[58] See also M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 111.

[59] Kofi Annan, *In Larger Freedom: Towards Development, Security and Human Rights for All*, Report of the UN Secretary-General, UN Doc A/59/2005 (2005), para 182, cited by C Chinkin, 'Promoting Compliance Now and Then: Mobilizing Shame or Building Partnerships?' in G P Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2010) 65.

[60] For a discussion of this crisis, see F Maupain, 'The ILO Regular Supervisory System: A Model in Crisis?' (2013) 10 *International Organizations Law Review* 117–165; C La Hovary, *The ILO's Supervisory Bodies' 'Soft Law Jurisprudence'* (14 July 2014), available at http://ssrn.com/abstract=2465933.

[61] International Labour Conference, *Report of the Committee on the Application of Standards, Provisional Record, 19(Rev.) Part One (E) and 27*, 101st Session (ILO 2012).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

showed up, with the consequence that no list could be adopted and no individual case of non-compliance could be discussed.

The employer members justified their boycott of the meeting by stating that the Committee of Experts had overstepped its mandate and they demanded a review of the Committee's working methods in view of its mandate granted by the ILO Constitution. During the following years the dispute could not be solved, whereupon the Governing Body drafted a resolution in October 2014 involving a request to the International Court of Justice to 'urgently render an advisory opinion' on the question whether the Committee of Experts had overstepped its mandate.[62] This event painfully emphasises the subordinate position of the Committee of Experts: the follow-up of its independent observations depends on the approval of the different constituents with their own interests. Apart from this radical and far-reaching incident, it is not exceptional that individual cases of non-compliance are not included in the list for discussion because of pressure from certain groups of Conference Committee members.[63] It may be concluded that also in a tripartite structure, constituents' own interests can obstruct independent supervision and create a deadlock in the follow-up of cases of non-compliance.

V.ii.c The weak mandate of the independent expert committees

The fact that the employer members of the ILO Conference Committee could blow the whistle on the Committee of Experts follows from the absence of an explicit mandate of the latter to make interpretations.[64] The same applies to the European Committee of Social Rights. The task of both committees is merely to assess whether national law and practice are in conformity with the international rules by which the member states are bound. However, in spite of this limited mandate, it is obvious that supervision and interpretation are interconnected – a decision on conformity is always based on a certain interpretation of the provision. This unclear status of the expert committees' decisions makes it possible for the political bodies to overrule negative conclusions and it severely hampers effective supervision in general. Ways should be found to legitimise their interpretative statements, for example through the adoption of important interpretations by the ILO Conference or Council of Europe Parliament respectively.

Apart from a formal legitimisation, it would also add to the authoritativeness of their conclusions if the expert committees were to explain and substantiate their views in more detail. It has been shown in Section IV that a main reason for the poor compliance rates regarding Article 12 of the European Social Charter relates to the Committee of Social Rights' broad interpretation of Paragraph 1. The fact that so few member states receive positive conclusions at this point suggests that the interpretation

---

[62] ILO Governing Body, *322nd Session* (ILO, 014) fifth item on the agenda, 'The standards initiative: Follow-up to the 2012 ILC Committee on the Application of Standards', Appendix 1.

[63] See, for example: International Labour Conference, Conference Committee on the Application of Standards, *Record of Proceedings* 16 Part One, points 11–14, 99th Session (ILO 2010).

[64] For a discussion on the competences of the Committee of Experts, see T Dijkhoff and F Pennings, 'The Interpretation of International Social Security Standards' in F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters* (Intersentia 2007) 63–166.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

of this provision does not enjoy widespread consensus. This is not completely incomprehensible. After all, the interpretation involves a shift from a very generally worded duty to establish and maintain a system of social security to a precise definition of what this duty at least entails; the Committee sets out a minimum standard that is not included in the text of this provision. Nevertheless, the interpretative statement is very brief and it is not explained what it is based on. It would contribute to the authoritativeness of the interpretations if the Committee were to elaborate on their theoretical and legal background and substantiate their interpretations with internationally accepted provisions, principles and concepts.

V.iii The Effect of Observations, Conclusions and Recommendations

The soft character of the supervisory mechanisms with no room for sanctions other than 'naming and shaming', the fact that established infringements may be obscured out of political or one-sided interest, and the weak mandate of the expert committees allow for poor compliance rates such as shown in Table 8.1. At the same time, it should not be forgotten that negative judgments also lead to improvements to and rectification of non-compliances in many cases. Member states usually try to avoid being included in the list of individual cases of non-compliance or being the subject of a condemnatory recommendation. The ILO regularly publishes 'cases of progress', and several case studies have been conducted that confirm the actual effect of the international social security standards and the supervisory procedures.[65] Although the last series of conclusions on Article 12 ESC (2013) was a bit more positive than that of 2009, it must be faced that recent cases of progress in the field of social security are scarce. In order to prevent social security from becoming the stepdaughter of social human rights, the reasons for the current trend of increasing disregard of the expert committees' negative conclusions should be examined more closely and openly discussed within and among the various bodies involved in supervision. This is all the more urgent in view of the consequences of the economic crisis, which has severely affected social security systems in many countries.

[65] See U Becker, F Pennings and T Dijkhoff, *International Standard-Setting and Innovations in Social Security* (Kluwer Law International 2013); T Dijkhoff, 'The Contested Value of International Social Security Standards in the European Union' (2012) 14(3) *EJSS* 174–198; T Dijkhoff, *International Social Security Standards in the European Union. The Cases of the Czech Republic and Estonia* (Intersentia 2011); U Kulke, 'The Present and Future Role of ILO Standards in Realizing the Right to Social Security' (2007) 60 *International Social Security Review* 119–141; F Pennings (ed), *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer Law International 2006); Y Jorens (ed), *The Influence of International Organization on National Social Security Law in the European Union. The Example of Old-age Pension* (Nomos Verlagsgesellschaft 2002).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

VI. THE (POOR) INFLUENCE OF THE SOCIAL PARTNERS AND CIVIL SOCIETY

The regular reporting systems of both the ILO and the Council of Europe devote a certain role to employers' and workers' organisations, enabling them to comment on the reports of their governments and to provide the supervising bodies with additional information. For the expert committees this input is valuable since it often points out possible frictions with the standards which might not have been made visible in the government's report. Trade unions, especially, do make use of this possibility, although certainly not systematically.[66] Moreover, social security is usually not at the centre of their interest, which means that comments are made on labour Conventions rather than on social security standards.

Within the ILO system, the social partners are also invited to make representations in cases of alleged infringements.[67] As regards Convention No 102, only six representations have been made since 1925, all between 1983 and 1995. Of these six representations, two were non-receivable, two were adopted by the Governing Body and directly referred to the Committee of Experts, and in two cases the Governing Body adopted the recommendations made by the committee that had examined the matter to require further information. These figures do not reflect an intensive participation in the supervisory procedure by the trade unions. Of course, the social partners do have a voice in all committees and bodies of the ILO, which gives them a permanent opportunity to influence the procedures. Nevertheless, it must be said that the trade unions do not capitalise on the additional space for interference on the part of the workers, especially in the field of social security. Moreover, the tripartite structure means that half of the members of a body are from governments while worker and employer members share the other half together. This makes the position of the trade unions not particularly strong.

The Additional Protocol on Collective Complaints to the Social Charter allows not only employers' and workers' organisations to lodge a complaint, but also international non-governmental civil society organisations other than trade unions and employers' organisations. This broadening of the scope of participants in the supervisory system reflects the changed positions in society.[68] First, trade unions typically suffer from declining membership rates. Second, they tend to represent first and foremost workers with 'traditional' jobs, whereas atypical labour contracts and self-employment are on the rise, leaving these workers under-represented. Third, social security – as well as other social rights – not only concerns workers, but also many other categories of

---

[66] M Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 114; L Bijleveld, 'The Role of ILO Conventions and Interpretation Problems: Experiences from the Trade Union Movement' in F Pennings (ed), *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law* (Kluwer Law International 2006) 102–105.

[67] See Section II.iv.

[68] E Riedel, 'Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights' in GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2007) 13; C Chinkin, 'Promoting Compliance Now and Then: Mobilizing Shame or Building Partnerships?' in GP Politakis (ed) *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2010) 64–65.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

citizens, whose interests are not represented by trade unions. The actual practice shows that international civil society organisations make up more than 50 per cent of the 110 complaints lodged since the start of the complaints procedure in 1998.[69] So far, the 10 complaints that relate (also) to Article 12 have for the greater part been submitted by national trade unions, five of them in 2012 by Greek pensioners' associations. But it is quite conceivable that international human rights organisations or organisations that represent specific vulnerable groups make use of negative conclusions of the Committee of Social Rights under Article 12 to prepare complaints. Their active involvement may also gain publicity for the Social Charter within society and put pressure on the governments in question to take action. In fact, one prerequisite for effective supervisory systems is public awareness of the standards that are supervised.[70] To achieve greater awareness, the support of and cooperation with civil society parties is crucial.

By allowing civil society organisations to complain, the Council of Europe can be considered a forerunner of the ILO. For the ILO, however, it might not be easy to make the representation or complaints procedure accessible for civil society organisations since in its Constitution these rights are reserved for employers' and workers' organisations and member states respectively. Still, the adoption of a special Protocol on the participation of civil society organisations could be considered, which, of course, would need the ratification of member states to become effective in that state. In any case, the ILO has acknowledged the present need to more intensively participate with civil society organisations, including in the field of social security. The Recommendation on National Social Protection Floors of 2012 is an example of this growing awareness, in assigning a formal consultative role to civil society organisations.

VII. CONCLUSIONS AND SUGGESTIONS FOR IMPROVEMENT

VII.i Conclusions

The effectiveness of the standard setting social security instruments of the ILO and the Council of Europe depends, first and foremost, on the member states' voluntary act of ratification and subsequently their application of the accepted standards. Although it could be assumed that member states would bring and keep their legislation and practice in line with the standards to which they have voluntarily chosen to be bound, this is often not the case. There is a wide discrepancy between their political will to accept standards on the one hand and to apply them on the other. Apparently, member states consider it politically favourable to ratify international and European social security instruments, but at the same time, the political will to implement them is often lacking. This ambiguous attitude undermines the effectiveness of the instruments and reflects a disrespect of or indifference towards international agreements and, in particular, towards the human right to social security.

---

[69] Case Law Database of the Committee of Social Rights, state per 1 October 2014.

[70] T Novitz, 'On Social Participation, Public Awareness and Social Capacity' in GP Politakis (ed) *Protecting Labour Rights as Human Rights: Present and Future of International Supervision* (ILO 2010) 105–108.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

This political ambiguity also affects the supervisory mechanisms, since the political bodies play a decisive role regarding the follow-up on the findings of the independent expert committees. Infringements of standards established by the latter are, in most cases, resolved or muffled in the meetings of the Council of Europe Governmental Committee and the Committee of Ministers, or the ILO Conference Committee. In fact, this is not very surprising; in systems that depend on close collaboration of the different constituents it is to be expected that confrontations are avoided as much as possible. Still, as far as supervision is concerned, a sound balance between the findings of the independent committees and the recommendations or resolutions by the political bodies is imperative for the credibility of both. In view of the future of the social security standards, the question of how to sufficiently safeguard this balance within the current systems needs to be addressed.

Obviously sanctioning is not one of the strengths of the supervisory machinery. The strong points are rather to be found in persuasion, guidance and (technical) assistance. Improvements to the currently poor follow-up on negative findings should first and foremost connect to these aspects and make the most of them. For the persuasive function, the active involvement of civil society organisations is indispensable. This would require better knowledge of standards within society and more transparency of supervisory procedures. The many possibilities in our communication era could be used to expeditiously inform and involve interest groups and non-governmental organisations in case of violations of certain standards. Prompt publication of and easy access to the different documents produced during the various stages of the different procedures – including the government reports, the comments of the social partners, and the conclusions of the expert committees – would add to the transparency of the supervision. It would give civil society organisations the necessary tools to expeditiously raise public attention to infringements of social rights and to create political pressure to solve the identified problems. Although accessibility of both ILO and Council of Europe documents has improved considerably during the past years, there is still a world of improvement to be gained.

It may be concluded that the supervisory systems are in need of adjustments in order to keep up with present-day developments. One of the developments that most seriously threatens the future of minimum social security standards is the growing negligence of member states towards their international obligations regarding social rights and especially regarding social security. The underlying reasons for this development should be investigated more closely and addressed in a transparent manner.

VII.ii Suggestions for Improvement

Throughout this chapter, several suggestions have been made that might contribute to effective supervision and help to attune the various supervisory mechanisms to present-time developments. To conclude, the various ideas are briefly summarised. Some of them are easy to implement, others are more complicated because of practical (institutional) reasons or political sensitivities – which should, however, not be obstacles to exploring improvements of decades-old mechanisms. The ideas are

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

clustered into different categories, but the clusters are very much interrelated and several measures would fit in different categories.

Preventive measures:

- stricter accession policies;[71]
- obligatory technical assistance before the ratification of standards, during substantive reforms of national legislation, and in cases of persistent non-compliance;
- development of the warning function of supervision, for example by including preventive comments such as indications of possible problematic trends or concrete recommendations for improvement in individual requests, general observations, conclusions or resolutions.[72]

Measures to increase the effectiveness of the expert committees' conclusions:

- better cooperation between the different bodies;
- official adoption of 'statements of interpretation' developed by the independent expert committees;
- involvement of the Parliamentary Assembly in the follow-up of negative conclusions (Council of Europe);
- election of members of the Committee of Social Rights by the Parliamentary Assembly (Council of Europe).

Measures to increase involvement of social partners and civil society organisations:

- promotion of the collective complaints procedure (Council of Europe);
- extension of the representation procedure to NGOs (ILO);
- obligatory communication of the state reports on the European Code to the social partners (Council of Europe);
- issuing of regular press releases and (digital) newsletters from the expert committees containing flagrant infringements and remarkable cases of progress.

Measures to increase states parties' willingness to meet their obligations:

- investigation of the underlying reasons for the discrepancy between the political will of member states to ratify the standards on the one hand and to comply with the standards on the other;
- better deployment of the instrument of naming and shaming;
- promotion of the minimum social security standards as a realisation of the human right to social security.

---

[71] See also P Alston, 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G De Búrca and B De Witte (eds), *Social Rights in Europe* (Oxford University Press 2005) 59.

[72] See also ILO, *Social Security and the Rule of Law* (ILO 2011) point 80.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Measures to create transparency in all phases of the supervisory process:

- improvement of the databases by: including the state reports; including the reports of the ILO Committee of Experts (Council of Europe); improving and extending search functions, e.g. by linking all documents of the different bodies involved regarding one state report, etc;
- publication of substantial explanations of interpretations by the expert committees;
- development of reliable statistics on (non-)compliance and follow-up actions by the political bodies and the states.

Other measures to facilitate and improve efficient supervision:

- creation of greater visibility of the European Code as the main European instrument for social security and better exploitation of its short supervision cycle, which provides relatively up-to-date information (Council of Europe);
- professionalisation of the expert committees, e.g. by creating full-time positions;
- increase of staff and facilities supporting the expert committees;
- exploitation of the possibilities of new information- and communication technologies.

Inevitably, improvements to the supervisory mechanisms will have financial consequences which have to be borne by the member states. However, not taking action implies accepting an increase of the already noticeable credibility deficit. In the end, it is the responsibility of the states to safeguard the human right to social security through, among other things, the implementation of minimum standards. Investments in more efficient supervisory mechanisms with preventive elements and active involvement of social partners and civil society are imperative for the future of the international social security standards.

BIBLIOGRAPHY

Alston, P (2005), 'Assessing the Strengths and Weaknesses of the European Social Charter's Supervisory System' in G De Búrca and B De Witte (eds), *Social Rights in Europe*, Oxford: Oxford University Press.

Annan, K (2005), *In Larger Freedom: Towards Development, Security and Human Rights for All*, *Report of the UN Secretary-General*, UN Doc A/59/2005, New York: UN.

Bartolomei de la Cruz, HG (1996), 'International Labour Law: Renewal or Decline?' in B von Maydel and A Nußberger (eds), *Social Protection by Way of International Law: Appraisal, Deficits and Further Development*, Berlin: Duncker & Humblot GmbH.

Bartolomei de la Cruz, HG, G von Potobsky and L Swepston (1996), *The International Labor Organization. The International Standards System and Basic Human Rights*, Colorado/Oxford: Westview Press Inc.

Becker, U, F Pennings and T Dijkhoff (2013), *International Standard-Setting and Innovations in Social Security*, Alphen a/d Rijn: Kluwer Law International.

Bijleveld, L (2007), 'The Role of ILO Conventions and Interpretation Problems: Experiences from the Trade Union Movement' in F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters*, Antwerp/Oxford: Intersentia 101–116.

Chinkin, C (2007), 'Promoting Compliance Now and Then: Mobilizing Shame or Building Partnerships?' in GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO 63–72.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Churchill, R, and U Khaliq (2004), 'The Collective Complaints System of the European Social Charter: An Effective Mechanism for Ensuring Compliance with Economic and Social Rights?' **15**(3) *EJIL* 417–456.
Council of Europe (2013), *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights. 6th Annual Report of the Committee of Ministers 2012*, Geneva: Council of Europe.
De Mars, B, D Pieters and P Schoukens (2010), '"Security" as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects' in U Becker et al (eds), *Security as General Principle of Social Security Law in Europe*, Groningen: Europe Law Publishing, 621 ff.
Dijkhoff, T (2011), *International Social Security Standards in the European Union. The Cases of the Czech Republic and Estonia*, Cambridge: Intersentia.
Dijkhoff, T (2012), 'The Contested Value of International Social Security Standards in the European Union' *EJSS* **14**(3) 174–198.
Dijkhoff, T and F Pennings (2007), 'The Interpretation of International Social Security Standards' in F Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters*, Antwerp/Oxford: Intersentia 149–174.
European Committee of Social Rights (2010), *European Social Charter (Revised). Conclusions 2009 – Volume 1*, Geneva: Council of Europe.
Hepple, B (2002), 'Enforcement: The Law and Politics of Cooperation and Compliance' in B Hepple (ed), *Social and Labour Rights in a Global Context*, New York: Cambridge University Press 238–257.
International Labour Conference, Conference Committee on the Application of Standards (2010), *Record of Proceedings* 16(1), Geneva: ILO.
International Labour Conference (2012), *Report of the Committee on the Application of Standards, Provisional Record*, 19(Rev.) Part One (E) and 27, 101st Session, Geneva: ILO.
International Labour Organisation (2011), *General Survey concerning Social Security Instruments in Light of the 2008 Declaration on Social Justice for a Fair Globalisation*, Geneva: ILO.
International Labour Organization (2011), *Social Security and the Rule of Law*, Geneva: ILO.
International Labour Organization (2012), *Handbook of Procedures Relating to International Labour Conventions and Recommendations*, Geneva: ILO.
Johanson, N and M Mikkola (eds) (2011), *Reform of the European Social Charter. Seminar Presentations Delivered 8 and 9 February 2011 at the House of the Estates and the University of Helsinki*, Helsinki: Ministry for Foreign Affairs of Finland.
Jorens, Y (ed) (2002), *The Influence of International Organization on National Social Security Law in the European Union. The Example of Old-age Pension*, Baden-Baden: Nomos Verlagsgesellschaft.
Korda, M (2013), *The Role of International Social Security Standards. An In-Depth Study through the Case of Greece*, Antwerp: Intersentia.
Korda, M and F Pennings (2008), 'The Legal Character of International Social Security Standards' *EJSS* **10**(2) 131–158.
Kulke, K (2007), 'The Present and Future Role of ILO Standards in Realizing the Right to Social Security' *International Social Security Review* **60** 119–141.
La Hovary, C (2014), *The ILO's Supervisory Bodies' 'Soft Law Jurisprudence'*, available at SSRN: <http://ssrn.com/abstract=2465933>.
Leary, V (1982), *International Labour Conventions and National Law: The Effectiveness of the Automatic Incorporation of Treaties in National Legal Systems*, The Hague/Boston/London: Martinus Nijhoff Publishers 17–34.
Maupain, F (2013), 'The ILO Regular Supervisory System: A Model in Crisis?' *International Organizations Law Review* **10** 117–165.
Mikkola, M (2010), *Social Human Rights of Europe*, Porvoo: Karelactio.
Nickless, N (2001), *European Code of Social Security. Short Guide*, Strasbourg: Council of Europe.
Novitz, T (2007), 'On Social Participation, Public Awareness and Social Capacity' in GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO, 105–108.
Otting, A (2010), 'The Monitoring of the Application of the European Code of Social Security and its Protocol', Training Course on Standard-Setting Instruments in the Social Security Field, Freiburg, Switzerland.
Pennings, F (ed) (2006), *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law*, The Hague: Kluwer Law International.
Pennings, F (ed) (2007), *International Social Security Standards. Current Views and Interpretation Matters*, Antwerp/Oxford: Intersentia.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

Pennings, F and B Schulte (2006), 'International Social Security Standards: An Overview' in F Pennings (ed), *Between Soft and Hard Law: The Impact of International Social Security Standards on National Social Security Law*, The Hague: Kluwer Law International 1–26.

Petman, J (2011), 'Final Remarks & Conclusions' in N Johanson and M Mikkola (eds), *Reform of the European Social Charter. Seminar Presentations Delivered 8 and 9 February 2011 at the House of the Estates and the University of Helsinki*, Helsinki: Ministry for Foreign Affairs of Finland, 41–44.

Politakis, GP (ed) (2007), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO.

Riedel, E (2007), 'Monitoring the 1966 International Covenant on Economic, Social and Cultural Rights' in GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO, 3–14.

Servais, JM (2005), *International Labour Law*, The Hague: Kluwer Law International.

Swiatkowski, AM (2007), 'The European Committee of Social Rights and the Collective Complaints Procedure under the European Social Charter' in GP Politakis (ed), *Protecting Labour Rights as Human Rights: Present and Future of International Supervision*, Geneva: ILO, 37–48.

Valticos, N (1996), 'Fifty Years of Standard-Setting Activities by the International Labour Organisation' *International Labour Review* **135**(3/4) 409–414.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:24:14PM
via University College London (UCL)

9. The coordinated governance of EU social security policy: Will there ever be enough?

Paul Copeland and Beryl ter Haar

I. INTRODUCTION

The legislative and policy activities of the European Union concerning social security – in a broad sense – are characterised by coordination. On the one hand the EU coordinates the social security systems of the Member States in the context of the free movement of workers. By the use of regulations, the EU has adopted a set of rules to determine which social security system applies in order to prevent a moving worker either paying social security contributions twice or from falling between two systems and consequently being deprived of any form of social security. This type of coordination has no direct intention to harmonise or replace the social security systems and leaves it to the discretion of the Member States as to who is to be insured and under what conditions. However, although the EU does not intend to influence the content of the domestic social security rules of the Member States, these regulations do have some harmonising effects. This is in particular true for EU measures on equal treatment, in particular in relation to pay, e.g., the *Defrenne* cases. Consequently, these private international law rules, their harmonising and the EU equal treatment rules and case-law, can be considered as 'hard coordination'.

On the other hand the EU coordinates the social security policies and legislation of its Member States in the broader context of social cohesion, more specifically in the fight against poverty and social exclusion, including employment, social inclusion, health care and pensions. The main regulatory driver for these social security topics is the EU's Open Method of Coordination (OMC). Rather than harmonising the policies and legislation of the Member States, the aim of the Open Method of Coordination is to coordinate policy efforts to achieve common goals, with the eventual indirect aim of converging national policies. To achieve this the Open Method of Coordination is characterised by policy guidance and guidance on outcomes and consists of a governance cycle that starts with the definition of common objectives, which are further elaborated in the policy guidelines and indicators. From this, EU priorities are set to further guide the Member States, as well as the setting of national targets to provide focus for policy reform. Member States periodically report about their national policies in country reports and the Commission and the Council review these reports in light of the priorities, policy guidelines and common objectives. Based on their findings the Commission and the Council can issue recommendations to the Member States, thereby redirecting their priorities and adjusting the common objectives and guidelines to changing policy tendencies. The findings are also used to review the common objectives, policy guidelines and indicators, which effectively form the start of a new cycle of the Open Method of Coordination. In this respect the Open Method of

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Coordination is a rather dynamic governance tool. Throughout the cycle Member States, often guided by the Commission, engage in the exchange of best practices. As such the Open Method of Coordination aims to influence domestic policies and regulation of the Member States in two ways: first by normative guidance via the use of common objectives, policy guidelines, indicators, recommendations and European priorities; and second, by cognitive guidance via the exchange of best practices between the Member States.

Unlike the 'hard coordination' of the regulations whose influence on the Member States is traceable via the adjustments of national policies and regulations, establishing causality between the Open Method of Coordination and national policy change is difficult. There are several reasons for this, among them two in particular. Firstly, due to the voluntary nature of the Open Method of Coordination in social policy (no/little competence is transferred to the EU), the Member States remain responsible for the policy and legislative actions concerning their social issues. Secondly, when reporting about their activities in their country reports, Member States tend to emphasise what is in compliance with EU objectives and minimise or camouflage what is not.[1]

As a relatively new mode of governance in the process of European integration the Open Method of Coordination has triggered a lively scholarly debate. Besides historical accounts on the genesis and rationale of the Open Method of Coordination,[2] and theoretical conceptualisations of it as a governance instrument,[3] the rich literature about the Open Method of Coordination includes numerous empirical case studies.[4] These studies produce conflicting accounts of the effectiveness of the Open Method of Coordination. Some scholars have argued that the Open Method of Coordination fosters at best cherry picking and results in the gradual erosion of the programmes and policies that constitute a European social dimension. Moreover, it distracts from efforts to create

---

[1] C De la Porte and J Pochet (eds), *Building Social Europe through the Open Method of Co-ordination* (PIE-Peter Lang 2002) 14.

[2] See for an overview B ter Haar, *The Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden University Press 2012) 7–9. See more particularly: J Goetschy, 'The European Employment Strategy: Genesis and Development' (1999) 5(2) *European Journal of Industrial Relations* 117–137; DM Trubek, P Cottrell and M Nance, '"Soft Law", "Hard Law" and EU Integration', in G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 65–94.

[3] See for an overview BP ter Haar, *The Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (University of Leiden 2012) 9–11; and more particularly G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US* (Hart Publishing 2006) 3; DM Trubek and JS Mosher, 'New Governance, EU Employment Policy, and the European Social Model', in J Zeitlin and DM Trubek (eds), *Governing Work and Welfare in a New Economy* (Oxford University Press 2003) 36; M Dawson, *New Governance and the Transformation of European Law. Coordinating EU Social Law and Policy* (Cambridge University Press 2011).

[4] Among many others C De la Porte and J Pochet (eds), *Building Social Europe through the Open Method of Co-ordination* (PIE-Peter Lang 2003); J Zeitlin and J Pochet (eds), *The Open Method of Coordination in Action* (PIE Peter Lang 2005); M Büchs, *New Governance in European Social Policy: The Open Method of Coordination* (Palgrave Macmillan 2007); M Heidenreich and J Zeitlin (eds), *Changing European Employment and Welfare Regimes* (Routledge 2009).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

a genuine social dimension via hard law measures that would counterbalance market-led integration. Others consider the Open Method of Coordination as an innovative breakthrough with superior capacity to solve some of the complex problems facing European society.[5] The purpose of this contribution is not to resolve this dispute, rather its aim is to unravel EU coordinative and supportive initiatives, i.e. EU initiatives that are addressed to the Member States with the intention to influence their domestic policies and legislation in the wider field of social security. Moreover, the aim is to assess the potential integration capacity of these activities based on their legal dynamics. These legal dynamics include: formal aspects such as the competence of the EU to deal with these issues in general and the specific type of actions in particular, EU general concepts such as supremacy of EU law and direct effect, and the type of incentives created to enforce and stimulate compliance with EU initiatives.

To complete the analysis of EU activity in the wider field of social security these initiatives and their legal dynamics are reviewed in relation to each other. This part of the analysis builds on the theory of hybrid structures, which argues that similar to the national level, EU initiatives do not operate in a policy vacuum; indeed they interact with many different activities. Generally three forms of interaction can be distinguished: rival, complementary, and transformative. The type of interaction between the different initiatives influences their effectiveness as a governance tool. The analysis reveals that the EU is more active in the wider policy field of social security than is often presumed by legal scholars. Since the main focus of this contribution is on the Open Method of Coordination as soft coordination, this analysis allows us to assess the particular role of the Open Method of Coordination in relation to other (soft) governance initiatives, such as recommendations, resolutions, and European funds, and its role in furthering EU social security.

The structure of this chapter is as follows. Section II provides a historical account of the development of EU activities in the wider policy field of social security. The section concludes with an inventory of the various initiatives that are generally applied by the EU in this field. Section III describes the analytical frameworks used to analyse the legal dynamics of these initiatives and their interactions. In Section IV the identified initiatives are analysed and the results are discussed in Section V. To conclude this contribution, the findings are critically assessed in the wider context of European integration, more particularly in the overarching policy context of Europe 2020 and the European Semester of which the soft coordination activities in the wider field of social security are part.

II. THE HISTORICAL DEVELOPMENT OF EU ACTIVITIES TO COMBAT POVERTY AND SOCIAL EXCLUSION

Legal studies regarding the European integration of social security predominantly focus on hard coordination. For other EU activities in the field of social security it is

[5] See for a reflection of this debate DM Trubek and LG Trubek, *Hard and Soft Law in the Construction of Social Europe*, Paper prepared for presentation at SALTSA, OSE, UW Workshop on 'Opening the Open Method of Coordination' (European University Institute 2003).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

necessary to look for specific policy topics. When reviewing the development of the European social dimension this is unsurprising, since it is characterised by a patchwork of policy activities.[6] Another distinctive feature of the social dimension is that the hard coordination of social security is one of the first actions in the process of European integration (Regulations 3 and 4 of 1958). However, the first broadly supportive European action dates back to 1975, namely a specific programme to combat poverty.[7] Subsequent programmes to combat poverty have been adopted in following periods. The core governance mechanism in these programmes is to provide financial support for national policies that fall within the scope of the programme. Member States are not obliged to participate in these programmes. Non-participating Member States are not forced to comply by a judicial procedure or by shaming. However, these programmes are highly sensitive as illustrated by a case initiated by the UK, supported by Germany and Denmark, to annul a proposal of the Commission to adopt the fourth poverty programme. The Court of Justice ruled in favour of the UK, arguing that the Treaty of Maastricht lacked a legal basis for European action in the sphere of social exclusion policies,[8] an omission that was restored with the Amsterdam Treaty reforms.

Despite the lack of a proper legal basis in the Treaties there was a considerable amount of political activity at the EU level in the 1990s, which raised awareness of the need for the modernisation of social protection systems. In 1992 the Council adopted a recommendation on the convergence of social protection objectives and policies.[9] This formulated a convergence strategy by which national social protection systems would be guided by principles laid down in the recommendation.[10] The aim of the convergence strategy was to help states face common challenges including those arising from social exclusion and demographic change.[11] De la Porte and Pochet refer to this recommendation as a 'premature version of the Open Method of Coordination'.[12]

Apparently aware of the sensitivity of poverty and social protection policies as an independent goal in themselves, the subject was framed in other policy fields. Hence, this resulted in two policy pathways to deal with these subjects. The first pathway concerns the poverty programmes that were framed in the field of human rights and EU citizenship, where relational issues of power, participation and integration into society

---

[6] See C Barnard, *EC Employment Law* (Oxford University Press 2006) 49; See also F Scharpf, 'The European Social Model: Coping with Challenges of Diversity' (2002) (40)4 *Journal of Common Market Studies* 645–670.

[7] The first formal programme of the EU addressing poverty dates back to 1975: Council Decision concerning a programme of pilot schemes and studies to combat poverty [1975] OJ L199/34.

[8] Case C-106/96 *United Kingdom v Commission* [1998] ECR I-2729, in particular paras 28–37.

[9] European Council, Recommendation 92/442/EEC on the convergence of social protection objectives and policies [1992] OJ L245/49.

[10] K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 31 and 65.

[11] *Ibid* 65.

[12] C De la Porte and J Pochet (eds), *Building Social Europe through the Open Method of Co-ordination* (PIE-Peter Lang 2002) 14.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

were stressed.[13] The second pathway concerns social protection policies, which became part of a concerted strategy within European Monetary Union (EMU) and in addition to the European Employment Strategy (EES).[14] In particular the development of the postmodern activation paradigm enshrined in the European Employment Strategy explains why Member States could agree to 'create and participate in a process coordinated at the European level for the area of social inclusion'.[15]

Preceded by the European Employment Strategy, the Lisbon Strategy reframed the governance structure into a general one and dubbed it the Open Method of Coordination. Since the modernisation of social protection systems was already on the EU political agenda in the 1990s, besides the Council Recommendation, the Commission adopted two communications,[16] the inclusion of this in the Open Method of Coordination could have been a simple matter of endorsement of existing policies and ideas by the Council.[17] This is one of the explanations as to why, after the introduction of the Open Method of Coordination in the Lisbon Strategy and the identification of social exclusion as one of the subjects it should be applied to, agreement could be reached in a remarkably short time after the adoption of the Lisbon Strategy.[18]

It took considerably more time for the Open Method of Coordination on health care and pensions to be launched, which were initially also part of the Council Recommendation and Commission Communications. However once in place all three forms of the social Open Method of Coordination were streamlined in 2005. The alleged advantage was that it would make the 'social Open Method of Coordination' more visible on the EU Agenda. Hence, the whole re-launch of the Lisbon Strategy in 2005 was to make clear the distinctive responsibility of the EU institutions for matters within the EU's competence, and to render the Member States more accountable for their exercise of domestic policy competence. Nevertheless, the streamlining of the forms of the social Open Method of Coordination in 2005 was considered by some to be a relegation of their priorities within the EU's governance architecture.

This strong division of competences is mirrored in the institutional embedding of social exclusion and social protection in the Treaty revisions. The governance structure of the European Employment Strategy is fixed in Article 148 of the Treaty on the Functioning of the European Union (TFEU) and a similar provision for the forms of the social Open Method of Coordination was discussed during the negotiations of the EU's

---

[13] G Room, *Beyond the Threshold: the Measurement and Analysis of Social Exclusion* (Policy Press 1995); and K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 68.

[14] *Ibid* 67–68.

[15] C De la Porte, 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' (2002) 8(2) *European Law Journal* 51. See also K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 65–69.

[16] These are the 1997 Commission Communication on *Modernizing and Improving Social Protection* ([1997] COM 102) and the Commission Communication on *A Concerted Strategy for Modernizing Social Protection* [1999] COM 347.

[17] K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010) 69.

[18] *Ibid* 69–71.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Constitutional Treaty. The idea was dropped as a result of political opposition and a belief that a formalised Open Method of Coordination provision would reduce the flexibility in the field. As a result, activities such as the policy coordination of social exclusion and social protection are merely acknowledged in the legal basis provisions in the Nice and Lisbon Treaties – now Article 153(2)(a) in the (TFEU).[19] Consequently, the social Open Method of Coordination remains vulnerable to political change in priorities and political views.[20]

This vulnerability became apparent with the Europe 2020 Strategy, which was adopted in 2010 as the successor of the Lisbon Strategy. Two changes made this clear. The first change concerns the position of social policy in relation to economic and employment policy in the strategies. The Lisbon Strategy considered economic, employment and social reforms as mutually reinforcing policies, in which social policy was manifested as a 'productive factor' at the benefit of economic and employment reforms.[21] With the re-launch of the Lisbon Strategy in 2005 the 'Lisbon-triangle' became a duo between growth and jobs, leaving social policy as a product of economic and employment reforms.[22] The EU launched Europe 2020 under the heading of the slogan 'smart, sustainable and inclusive growth', aiming for an economy based on 'knowledge and innovation', which is 'resource efficient' and 'greener', and fosters 'high employment' and 'social and territorial cohesion'.[23] Europe 2020, despite aiming to give EU social policy a higher profile, has had the opposite effect and further relegated its importance within the EU's hierarchy of priorities, an impression that is easily reinforced by the second change: the governance structure of the strategy.

Armstrong interprets the change in governance structure between the Lisbon Strategy and Europe 2020 as a move from the governance of coordination to the coordination of governance.[24] Lisbon introduced the Open Method of Coordination as a new integration instrument in order for the European Council to gain the (political) lead over the Strategy. A good part of Lisbon was therefore about the Open Method of Coordination and the policy areas it should be applied to.[25] The re-launch of the Strategy in 2005 was the EU's first attempt to streamline the different coordination processes. Effectively this meant that the cycles of the economic and employment Open Method of Coordinations

---

[19] *Ibid* 70.

[20] See B ter Haar and P Copeland, 'What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy' (2010) 16(3) *European Law Journal* 273–291.

[21] K Armstrong, 'The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance', in P Copeland and D Papadimitriou (eds), *Evaluating the EU's Lisbon Agenda* (Palgrave Macmillan 2012). See also M Daly, 'EU Social Policy after Lisbon' (2006) 44(3) *Journal of Common Market Studies* 461–481.

[22] See European Commission, *Working together for growth and jobs. A new start for the Lisbon Strategy* [2005] COM 24; European Commission, *Consultation on action at EU level to promote the active inclusion of the people furthest from the labour market* [2006] COM 44 final.

[23] European Commission, *Europe 2020: A strategy for smart, sustainable and inclusive growth* [2010] COM 2020.

[24] K Armstrong, 'The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance', in P Copeland and D Papadimitriou (eds), *Evaluating the EU's Lisbon Agenda* (Palgrave Macmillan 2012).

[25] European Council, *Presidency Conclusions* (Lisbon 2000).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

were integrated[26] and, as already mentioned, that the forms of the social Open Method of Coordination – social inclusion, health care and pensions – were integrated in a single separate governance framework.[27] In the words of Armstrong, the re-launch should be regarded as a step in the move to govern the coordination process, albeit in two parts: economic with employment on the one hand; and the forms of the social Open Method of Coordination on the other. Europe 2020 takes this one step further. All the common objectives are reformulated and integrated, targets on all four subjects (economic, employment, environment and social) are set, and all Open Method of Coordination cycles are further integrated into one single process, also known as the European Semester.[28] The new integrated policy guidelines include only one guideline dealing with the social topics.[29] Newly added by Europe 2020 are flagship initiatives around which the target activities are focused. One of the flagship initiatives is the Platform against Poverty and Social Exclusion. However, how the latter relates to the original Open Method of Coordination is unclear, other than that the overall intention of Europe 2020 is 'coordinating and pooling the relevant governance instruments and tools at EU and national levels within the context of the flagship initiatives'.[30] The coordinated policy governance of Europe 2020 enables the EU to tackle issues in a broader context. The country-specific recommendations of 2012, for example, stress the need for reforms on issues such as: prolonging working lives and incentives to work; providing better (employment) opportunities for women and young people; improving the effectiveness of social transfers and assistance systems; and ensuring access to quality services.[31] This was picked up by the Annual Growth Survey, which launched the 2013 European Semester.

---

[26] Member States had to submit their country reports on employment and the broad economic policy guidelines at the same time starting with the 2004 cycle. The Commission and Council reviewed these reports in conjunction with each other. See, among other communications, European Commission, *Streamlining the annual economic and employment policy coordination cycles* [2002] COM 487 final, and European Commission, *Strengthening the implementation of the European Employment Strategy* [2004] COM 239 final.

[27] European Commission, *Strengthening the social dimension of the Lisbon Strategy: streamlining open coordination in the field of social protection* [2003] COM 261 final.

[28] K Armstrong, 'The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance', in P Copeland and D Papadimitriou (eds), *Evaluating the EU's Lisbon Agenda* (Palgrave Macmillan 2012); European Commission, *Europe 2020 – a strategy for smart, sustainable and inclusive growth* [2010] COM 2020 final.

[29] Council Decision 2010/707/EU, [2010] OJ L308/46. See on this also B ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (University of Leiden 2012) 73–77.

[30] Cf K Armstrong, 'The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance', in P Copeland and D Papadimitriou (eds), *Evaluating the EU's Lisbon Agenda*. (Palgrave Macmillan 2012).

[31] [2012] Com 83 final, 5.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

This 2013 Semester also began with the adoption of the Social Investment Package.[32] The aim of the Social Investment Package is to guide 'Member States to modernise their welfare systems towards social investment throughout life.'[33] Institutionally it is clear that the Social Investment Package is embedded in the governance framework of Europe 2020 – the European Semester. As a policy subject it is somewhat puzzling how the Social Investment Package relates to the other social issues of Europe 2020, in particular the flagship initiative Platform against Poverty and Social Exclusion. It would appear that it is part of the Platform, as it coordinates the different policies that have been pooled together in the Platform. It can be argued that the Social Investment Package provides a governance structure for the Platform since it pools together the subjects of the Platform and it coordinates the various governance initiatives applied to those subjects. Furthermore, the Social Investment Package explicitly emphasises that it is complementary to the Employment Package, the White Paper on Pensions, and the Youth Package.[34]

The result is a complex governance regime with an integrated and coordinated governance structure, pooling together specific subjects in the field of social inclusion and social protection. Moreover, it coordinates and pools together several governance instruments, among which are the Open Method of Coordination, which governs Europe 2020 itself, the European Employment Strategy (in which the poverty and social exclusion guideline is integrated), and financial support via the European Social Fund, Resolutions, Decisions, etc. Table 9.1 gives a more detailed overview of the policy fields involved and the integration instruments used to govern these policies. Figure 9.1 provides a schematic of the policy regime on social inclusion and social protection. This regime also indicates how the policies are pooled together, which is an indication of how the related instruments can potentially interact.

Altogether there is a significant level of activity at the European level, but what does this mean in terms of its ability to influence and change the policies and legislation of the Member States? As previously mentioned in the introduction, it is extremely difficult to prove causality between EU soft coordination (by the Open Method of Coordination) and policy changes at the national level. However, we can gain some insight into their ability to influence policy changes in the Member States by analysing their legal integration dynamics. A second issue is that the interaction of different policy instruments can potentially strengthen their effect (or in some cases undermine them), as the sum of their parts can be greater than the individual components. The following sections of this contribution are therefore concerned with an analysis of the legal dynamics of the integration instruments involved in the governance of social inclusion and protection, their interaction, and the effect of their interactions.

---

[32] European Commission, *Towards social investment for growth and cohesion – including implementing the European Social Fund 2014–2020* [2013] COM 83 final.

[33] *Ibid.*

[34] http://ec.europa.eu/social/main.jsp?catId=750&langId=en (visited on 4 May 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Table 9.1 Overview of governance instruments for social inclusion and social protection

Policy subject	Short description	Instruments
Europe 2020	Ten-year strategy for smart, sustainable and inclusive growth	European Semester (Open Method of Coordination)
Social Investment Package	Long-term strategy to help overcome the financial and economic crisis and to strengthen the capacity of individuals. Coordinates seven policy fields and is complementary to the Employment Package, Youth Employment Package and the White Paper on Pensions	European Semester (Open Method of Coordination)
Active inclusion	Policy field 1 of Social Investment Package Is about enabling citizens to participate fully in society. Covers three main issues: 1. Adequate income support and help to get a job 2. Inclusive labour markets 3. Access to quality services to help people participating in society, including getting back on the labour market	Open Method of Coordination Social Inclusion/Protection European Employment Strategy European Social Fund
Social innovation	Policy field 2 of Social Investment Package Is about developing new ideas, services and models to better address social issues	Europe 2020 (esp. country-specific recommendations) European Social Fund PROGRESS Social Agenda
Investing in children	Policy field 3 of Social Investment Package Aims to break the cycle of poverty by early interventions and preventive approaches Directly linked to: Youth in Action Youth Pact Indirectly linked to: European Employment Strategy	Europe 2020 (esp. country-specific recommendations) Several European funds: ESF, PROGRESS, FEAMD Recommendation (investing in children) Several forms of OMC (youth, employment)
Homelessness	Policy field 4 of Social Investment Package Defines challenges, but no policy measures. EU supportive action by funding Linked to: Poverty and Social exclusion	Several funds: ESF, FEAMD, European Regional Development Fund

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Table 9.1 (continued)

Policy subject	Short description	Instruments
Poverty and social exclusion	Policy field 5 of Social Investment Package Thematic focus of Europe 2020 in flagship initiative 'Platform against Poverty and Social Inclusion' Broad umbrella for wide variety of policies, with three main objectives: 1. To eradicate poverty and social exclusion 2. To guarantee adequate and sustainable pension systems 3. Accessible, high-quality and sustainable health care and long-term care	Europe 2020 (flagship initiative) Several forms of: European Employment Strategy (policy guideline 10) OMC social inclusion/protection Stakeholder network platform European 'year' in 2010 ESF (20% earmarked)
Active ageing	Policy field 6 of Social Investment Package Is about helping people to stay in charge of their own lives for as long as possible as they age and, where possible, to contribute to the economy and society Includes ideas about intergenerational solidarity Indirectly linked to: European Employment Strategy Non-discrimination	Declaration European Council (guiding principles) European 'year' in 2012 Mainstreaming *OMC (European Employment Strategy)* *Directive (age-discrimination)*
Social Services of General Interest	Policy field 7 of Social Investment Package Is about improving quality of life and providing social protection Directly linked to (other) general objectives of the EU: Social cohesion High employment Social inclusion Economic growth Overlap with many other policy fields: social security; employment and training services; social housing; child care; long-term care; social assistance service	Voluntary EU quality framework (in development – OMC) Funding via PROGRESS

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

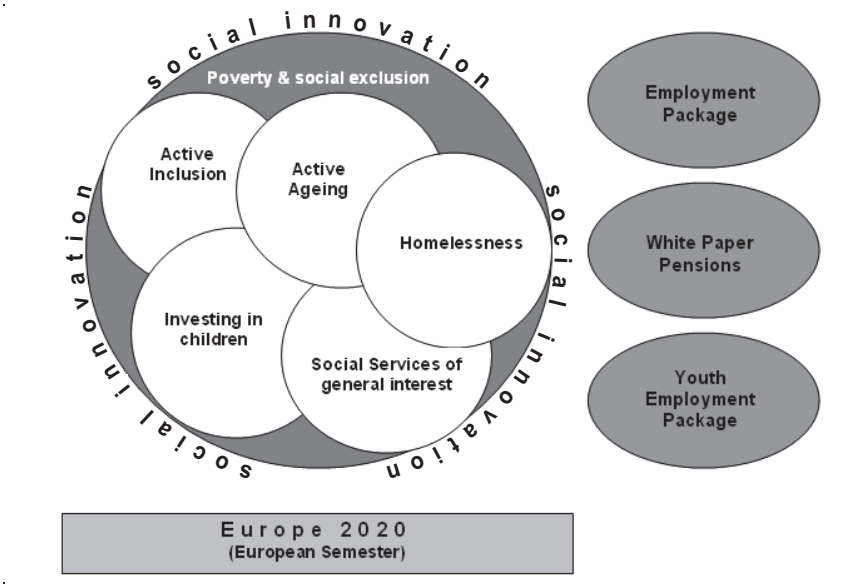

Figure 9.1 Governance regime for social inclusion and social protection

III. LEGAL INTEGRATION DYNAMICS OF THE *ACQUIS COMMUNAUTAIRE* SOCIAL SECURITY

III.i Analytical Model Legal Dynamics of EU Integration

European integration is a complex process driven by economic, political and legal dynamics.[35] To understand the legal dynamics of EU integration Dehousse and Weiler construct a model with key parameters for EU policy, which subdivides into different levels of integration capacity, varying from weak to strong.[36] This model has been updated and further developed by us.[37] The model is underpinned by the concepts of

[35] R Dehousse and JHH Weiler, 'The Legal Dimension of Integration', in W Wallace (ed) *The Dynamics of European Integration* (The Royal Institute of International Affairs 1990) 242–260.

[36] *Ibid*, 249–253.

[37] B ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (University of Leiden 2012) 86–95. This chapter is also published as B ter Haar, 'The Growing Potential Integration Capacity of the European Social Model', *European Integration online Papers* (Leiden 2009) Vol 13. Furthermore, this model has been applied in BP ter Haar and P Copeland, 'What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy' (2010) 16(3) *European Law Journal* 273–291.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

'integration' and 'legal'. The concept of 'integration' within this model is understood as 'a process of change in national institutional and policy practices that can be attributed to European integration'.[38] Hence, it is about the harmonisation and convergence of domestic laws and policies of the Member States. The concept of 'legal' refers to the question: what is legal and when is the legal ambit exceeded? This clarification is of particular relevance for the definition of the four levels of integration capacity of the parameters. The interpretation of 'legal' underpinning our model is derived from an international relations understanding of legalisation.[39] As such, the model covers EU hard law instruments such as regulations, directives and decisions, and legally non-binding instruments that have a normative effect (also referred to as 'soft law'),[40] such as resolutions, recommendations, action programmes and the Open Method of Coordination.

Based on these two underlying concepts the model is comprised of five parameters: (1) competence conferred to the European Union for (further) rule-making; (2) the integration technique used; (3) the decision-making capacity of the EU institutions adopting the instrument; (4) the incidence or effect of the instrument on the national legal order; and (5) the means to foster compliance with the normative part of the instrument. Each parameter is subdivided into four levels of integration capacity. Level 4 indicates a weak integration capacity and level 1 indicates a strong integration capacity. Integration capacity in this model refers to the extent to which the instrument under analysis is likely to integrate, converge or influence the laws and policies of the Member States. This means that when most of the parameters in an instrument are analysed as level 3 or 4, the extent to which the instrument is likely to integrate, converge or influence domestic laws and policies is weak. Conversely, when most of the parameters in an instrument are analysed as level 1 or 2, its integration capacity is considered to be strong. Figure 9.2 summarises the analytical model.[41]

---

[38] MP Vink, 'Negative and Positive Integration in European Immigration Policies' *European Integration online Papers* (Leiden 2002).

[39] KW Abbott, RO Keohane, A Moravcsik, A-M Slaughter and D Snidal, 'The Concept of Legalization' [2000] *International Organization* 421–456; further elaborated by BP ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden 2012) 41–59.

[40] See on this more elaborately L Senden, *Soft Law in European Community Law* (Hart Publishing 2004). See for a more philosophical account J D'Aspremont, 'Softness in International Law, A Self-Serving Quest for New Legal Materials' (2008) (19)5 *European Journal of International Law* 1075–1093.

[41] See for a more elaborate description of the analytical model BP ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden 2012) and B ter Haar, 'The Growing Potential Integration Capacity of the European Social Model', *European Integration online Papers* (Leiden 2009) vol. 13.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Weak integration / Strong integration	Manifestation level	1. Conferred competence	2. Integration technique	3. Decision-making capacity	4. Effect national legal order	5. Ensuring compliance
	4	Supportive competence	Procedural obligations	Moving spirit	Indirectly effective	Persuasive pressure
	3	Coordinative competence	Coordination	Specific function	Ratification	Institutional Surveillance
	2	Shared competence	Minimum harmonisation	Executive rule-maker	Conditionally effective & applicable	ECJ: preliminary ruling
	1	Exclusive competence	Total harmonisation	Law-maker	Directly effective & applicable	ECJ: direct action

Figure 9.2 Analytical model to analyse the legal integration capacity of EU instruments

III.ii Analysis of the Legal Dynamics of the *Acquis Communautaire* of Social Security

Section II described the historical development of EU integration in the field of social security and gave focus to social inclusion and social protection. The historical account reveals that with the exception of the coordinating regulations, most of the other instruments that embody the *acquis communautaire* of social security are soft law instruments. Since they have been pooled together by the Social Investment Package, the analysis of the legal dynamics of this field is limited to these instruments (see Table 9.1). This may not capture all of the instruments that are part of the *acquis*, yet since it is the core of the *acquis* the analysis of these instruments will be sufficiently representative of the whole *acquis*. The analysis is structured by type of instruments, thus the Open Method of Coordination, resolution, action programme, etc and by specific policy field. The first distinction is convenient, since instruments of the same type share similar qualifications on certain parameters, in particular integration technique, effects on the national legal order and ensuring compliance. The second distinction is needed since the policy field is influential in the qualification of the first and third parameters – conferred competence and decision-making capacity.

Since the interest of this analysis lies with the integration capacity of the EU instruments to integrate, converge or influence the laws and policies of the Member States, the analysis is limited to instruments that address Member States. This excludes, for instance, the Europe 2020 Strategy and the Social Investment Package, and also the Social Agenda and European 'Year'. The first two are excluded since they address governance activities of the EU institutions by the establishment of a coordinative framework in which those activities are pooled together. As such, they merely address the Member States indirectly, namely via the activities they yoke together in their

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

governance structure. This is influential on the integration capacity of those instruments, however this cannot be assessed by this analytical model but will be analysed in the next section on the hybrid structures between the instruments analysed in this section. The other instruments, the Social Agenda and European 'Year', are political instruments to raise attention for the subjects on political levels and not legal instruments that aim to integrate, converge or influence Member States' laws and policies. Based on the inventory listed in Table 9.1, this leaves the following types of instrument: several forms of the Open Method of Coordination; funds; (country-specific) recommendations; declarations; directives; and frameworks.

III.ii.a Legal integration capacity of the Open Method of Coordination

In total three forms of the Open Method of Coordination are involved in the Social Investment Package: the European Employment Strategy; the social forms of the Open Method of Coordination (inclusion, health care and pensions) and the youth Open Method of Coordination.

Competence The first parameter deals with the type of competence conferred to the EU to deal with a certain subject. While in the pre-Lisbon Treaty era it was difficult to determine the exact type of competence that was conferred to the EU,[42] this has become more straightforward since the introduction of the Lisbon Treaty. The TFEU has introduced a catalogue of competences in its first part – Articles 2–6 TFEU. Article 2 TFEU explains the different types of competences, and Articles 3–6 TFEU define which subjects fall within the different types of competences. To what extent a competence can be executed depends on the exact formulation of the legal basis provision also included in the TFEU.

Regarding employment Article 5(2) TFEU stipulates that the EU takes measures to coordinate the employment policy of the Member States. This is expanded in Title IX of the TFEU and Article 148 thereof. Article 148 TFEU is very specific in the governance structure for the measure the EU is allowed to adopt, namely that of the Open Method of Coordination. This is less clear for the forms of the social Open Method of Coordination. First of all the 'competence catalogue' holds two provisions addressing social issues. Article 4 TFEU attributes shared competence in the field of social policy 'for aspects defined in this Treaty' and Article 5(3) TFEU attributes coordinative competence to the EU to 'take initiatives to ensure coordination of the social policies of the Member States'. To determine the exact competence for the issues covered by the forms of the social Open Method of Coordination, we have to look at the legal basis provision in the TFEU, which is Article 153. All three subjects are listed in subparagraph 1 of Article 153: social exclusion is sub j and health care and pensions fall within the scope of sub k (modernisation of social protection systems). Subparagraph 2 of Article 153 TFEU stipulates the different regulatory activities the EU can take regarding the subjects listed under subparagraph 1. One regulatory action is to

[42] See for this in general, L Senden, *Soft Law in European Community Law* (Hart Publishing 2004) 79–93; in relation to EU employment law, C Barnard, *EC Employment Law* (Oxford University Press 2006) 63–66; and in relation to the Open Method of Coordination, B ter Haar, *Open Method of Coordination* (Leiden 2012) 67–71.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

adopt minimum standard directives, which are typical instruments for shared competence. However, this action is limited to the subjects referred to in paragraph (1)a–i, excluding the subjects of the forms of the social Open Method of Coordination that are referred to in paragraph (1)j–k. This leaves only the second form of action, which is to 'adopt measures designed to encourage cooperation between Member States' (Article 153(2)(a) TFEU). Hence the competence to deal with the subjects of the forms of the social Open Method of Coordination is limited to coordination.

The competence to deal with youth policies is even more complex. In the 'competence catalogue' one reference is found to youth as a policy field, namely in Article 6(e) TFEU, which contributes a supporting and supplementing competence to the EU. However, when searching for legal basis provisions dealing with youth, two are found. The first is Article 47 TFEU, which is part of the free movement of people (part of the internal market). The competence of the EU concerning the internal market is that of shared competence, which is from a European point of view much stronger than supporting and supplementing, since it includes the option to adopt harmonising measures.[43] That the field of youth policy is not intended to result in harmonising actions of the EU can be deduced from the activity it describes: 'Member States shall, within the framework of a joint programme, encourage the exchange of young workers'. This is very similar to the other legal basis provision dealing with youth, Article 165(2) TFEU, which reads as a fifth field of action 'encouraging the development of youth exchanges and of exchanges of socio-educational instructors, and encouraging the participation of young people in democratic life in Europe'. At best both provisions provide the legal basis to adopt supporting and supplementing provisions.

Integration technique The integration technique of the European Employment Strategy is rather straightforward since it is the prototype of coordination of the policies of the Member States. The integration technique of the forms of the social Open Method of Coordination is more diffuse. All three of them intend to coordinate the policies of the Member States, however the Open Method of Coordination on social inclusion is more developed compared to health care and pensions. However, all of the social types of the Open Method of Coordination are more focused on measuring policy outcomes rather than a convergence of policies. Consequently, the focus of the social Open Method of Coordination lies more with the indicators than the policy guidelines. Nonetheless, the core integration action is the coordination of the policies of the Member States, and hence the integration technique is that of coordination. The youth Open Method of Coordination is again different from both the European Employment Strategy and the social Open Method of Coordination. The main regulatory instrument is a resolution that sets the framework for youth policies. The governance structure set by the resolution is comprised of common objectives, policy guiding principles, a three-year thematic focus (priority), knowledge building, information sharing and

[43] See on this also D Curtin, 'European Legal Integration: Paradise Lost?', in D Curtin et al (eds), *European Integration and Law* (Intersentia 2006) 1–56.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

peer-learning activities. Together these governance mechanisms are identified as an Open Method of Coordination.[44]

Nonetheless, the EU seems to have stretched its competence in this field with the adoption of the 2009 Framework Resolution, which is an Open Method of Coordination coordinating all governance actions in the wider field of youth policies.[45] A historical analysis of the evolution of EU youth policies has indicated that EU youth policy, including the Open Method of Coordination and its coordination of the governance actions in the nine specific fields of action, are the result of political processes in favour of youth and the Open Method of Coordination. On a closer look at the elements comprising the youth Open Method of Coordination there are two distinctive differences from the European Employment Strategy and the types of the social Open Method of Coordination: no obligation for Member States to submit country reports; and no indicators to measure the achievements of the Member States towards the common goals. This does not necessarily render the governance structure as not being an Open Method of Coordination; however, in view of the integration technique, what is left is the coordination of measures supporting the Member States to achieve the common goals. It is not the policies or policy outcomes of the Member States that are coordinated, hence it is the EU supporting measures that are coordinated. In this respect the conclusion is that the integration technique of the youth Open Method of Coordination is supportive.

Decision-making capacity This parameter strongly relates to the first, the competence of the EU. In essence, the institutions of the EU making the decisions cannot go beyond the competence conferred upon them. Regarding the European Employment Strategy the decision-making capacities of the EU institutions are very clear. Article 148 TFEU, which outlines the governance structure for EU employment coordination, also defines which EU institutions can take what kind of decisions. For each governance element – common objectives, guidelines and recommendations – another procedure is described. None of them follow one of the general EU procedures, for instance the law-making procedure or the social dialogue. Instead specific procedures are formulated. In our analytical model this qualifies as the EU institutions making decisions in a specific function, namely as coordinators of the employment policies of the Member States. This is similar for the youth Open Method of Coordination that is adopted in accordance with the specific procedure laid down in Article 165 TFEU.

The forms of the social Open Method of Coordination have a clear competence within Article 153(2)(a) TFEU, which requires the EU institutions to decide on measures by using the law-making procedure. The practice deviates considerably from this. For instance, the Open Method of Coordination on social inclusion has been launched without any clear measure deciding on its implementation. Instead, the clearest instrument in this respect is a Council Conclusion defining the common objectives, guidelines, indicators and obligations of the Member States to submit

[44] http://europa.eu/legislation_summaries/education_training_youth/youth/ef0022_en.htm.

[45] BP ter Haar and P Copeland, *EU Youth Policy: A Waterfall of Softness* (Universiteit Leiden 2011) *Onderzoeksmemorandum HSZ.*

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

national reports and its three-year cycle.[46] The streamlining of the three forms of the social Open Method of Coordination in 2005 is also not decided on in a formal EU integration instrument, but done in a non-specific document of the Commission, which is not even a Communication. Even though the EU institutions have the option to act as lawmakers they have not done this. Due to the lack of a clear decision, at best the practice can be assessed as moving spirit, meaning that the EU institutions set the pace and shape of the policies by declarations of intentions and guidelines for further EU and national policy actions.[47]

Effects on the national legal order A common basic characteristic of the forms of Open Method of Coordination is that they are legally non-binding integration instruments. This means that participation by the Member States is voluntary and that the effect of the Open Method of Coordination on the national legal order is, per definition, indirect. Moreover, the aim of the Open Method of Coordination is to coordinate the policies of the Member States via policy guidelines and indicators. It is up to the Member States to decide how and to what extent they adjust their national policies and laws to the normative suggestions of the Open Method of Coordination. This is especially true for the forms of the social Open Method of Coordination and the youth Open Method of Coordination. With respect to the European Employment Strategy this seems to be less voluntary when it comes to the formal requirements, such as the submission of country reports.[48] Nonetheless, when it comes to the normative aspect of the European Employment Strategy this cannot be upheld; it is not up to the EU to decide which actions need to be undertaken at national level; this belongs to the competence of the Member States.

Ensuring compliance Following on from the above, the means to ensure compliance are also limited. Maybe with the exception of the formal, procedural part of the European Employment Strategy, it is characteristic for the Open Method of Coordination to leave it up to the Member States to decide which actions need to be taken in order to achieve the common goals. Moreover, given the nature of the Open Method of Coordination – open, flexible norms that strive for convergence, but allow for difference – it is an impossible task for a court to judge whether a Member State has sufficiently fulfilled its obligations.[49]

Instead the Open Method of Coordination relies on institutional surveillance by the Commission and the Council. Together they draw up reports about the general achievements of the Member States, which allows them to identify tendencies in policy directions and achievements. This creates a context in which outliers can be identified, i.e. Member States that either perform significantly better or worse. While taking into

---

[46] BP ter Haar, *Open Method of Coordination* (Leiden 2012) 72–73.

[47] *Ibid*, 91–92.

[48] *Ibid*, 77–78.

[49] See for an illustration of the problems a court may face, D Ashiagbor, 'The European Employment Strategy and the Regulation of Part-time Work', in S Sciarra, P Davies and M Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union. A Comparative Analysis* (Cambridge University Press 2004) 43–52.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

account the specific situation (for example the type of welfare state) and the problems individual Member States are facing, the reports set a comparative baseline on which the Council adopts country-specific recommendations. With these recommendations the Commission and Council redirect or support the priorities of the Member States. In order to monitor the extent to which the Member States take these recommendations into account, they are required to report progress in their national action plans. This form of institutional surveillance can also be indicated as normative surveillance.

III.ii.b Legal integration capacity of the funds

The use of funds in the Social Investment Package is remarkable in the sense that six out of the seven policy fields of the Social Investment Package are financially underpinned by a fund.[50] Five out of these six fields are supported by the European Social Fund (ESF) and three out of these six policy fields are supported by two or more funds. Besides the ESF, the following funds are used: PROGRESS, the Fund For European Aid to the Most Deprived (FEAMD), and the European Regional Development Fund (ERDF). The aim of the funds is not to harmonise the legislation of the Member States, instead it is to financially support the Member States when they experiment with new policies and laws that are in line with the EU policy initiatives. Member States are not obliged to make use of the funds; they can apply for them when they are eligible. A Member State is eligible when it is conducting activities in line with the EU policy initiative connected to the fund. This is slightly different with the ESF, which allocates budgets to the Member States. The Member States have to decide on the policy priorities at national level with those priorities linking to the main objectives of the ESF.

The funds all have in common that they indirectly influence the policies and legislation of the Member States. Because the financial support received from a fund needs to be applied in a policy field promoted by the EU, it stimulates the Member State to undertake activities in line with the EU policy field and encourages them to experiment with different policies to achieve a certain objective. If the policy is unsuccessful it will not be continued, when it is successful it will be incorporated into the ordinary policies and laws of the Member States. Once the latter happens, the national policies and laws come closer to the EU objectives.

This indirect effect of the funds and the allocation of substantial amounts of money to certain policy objectives can result in Member States being wary about the establishment of the funding programmes. Moreover, the acceptance of a financial support programme in a particular policy field equals acknowledging EU competence in that field. From a political perspective this is not always desirable, hence the UK and Denmark began proceedings to annul the poverty action programme in 1996.[51] Thus, although the funds themselves do not regulate policy fields, they have a regulatory effect in the sense that they influence the policy choices of Member States when the

[50] Only the policy field Active Ageing is not explicitly supported by any of the funds. However, it is indirectly, since active ageing is also part of the European Employment Strategy, which is financially supported by PROGRESS.

[51] Case C-106/96 *United Kingdom v Commission (Social Exclusion)* [1998] ECR I-2729. See on this also Section II of this chapter.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

latter are undertaking activities that are financially supported by a fund. Consequently, the EU cannot apply funds in areas where its competence is not acknowledged. Because of the indirect effect of the funds on the policies, the required level is that of supportive, since it is up to the Member States to decide to apply for financial support and, when they do so, to define the extent of their policy actions.

When a Member State has opted for financial support by a fund, it is obliged to report on how the money is spent and the results of the activities undertaken. In particular, the financial reporting can be very strict.[52] The monitoring of compliance is strict when it comes to the formal application rules and accounting reports on how the money is spent. Regarding the latter the Courts of the European Union have ruled on many occasions. Often the financial support is suspended or reduced because of budgetary irregularities or failing management.[53] This gives the impression that the capacity of the funds to ensure compliance is very strong (judicial review), however, the aim of this analysis is to assess the legal capacity of the funds to integrate the policies and laws of the Member States. In this respect funds are not that strong. In general the rules on the funds[54] can be read as the policy activities being subject to institutional surveillance. Member States have to report annually about the impact of the funds on achieving the objectives of the programmes[55] and these are evaluated by the Commission. The outcome of the evaluation is discussed with the Member State and, where necessary, the Commission can issue recommendations to the Member States to adjust their priorities and programmes in order to improve the policy impact of the funds.

III.ii.c Legal integration capacity of the voluntary guiding instruments

Under the heading of different names, among which are Commission recommendations and the declarations of the European Council and the Voluntary EU Quality framework, the EU guides policy activities of the Member States in four of the policy fields of the Social Investment Package. These instruments all have in common that they are adopted in the fields where the competence of the EU is not explicitly named in the TFEU. Active inclusion is, for instance, part of the EU's efforts to combat social exclusion and the modernisation of social protection systems, respectively regulated in Article 153(1)(j) and (k) TFEU. Another example is active ageing, which is an independent policy field and has no legal base in the Treaty. However, it is also part of the employment guidelines, which are based on Article 148(2) TFEU.[56] As such these guiding principles could be considered as tertiary EU law providing further interpretation of EU secondary law, i.e. employment guideline 7 of the European Employment

---

[52] See for an impression of the rules and regulations related to the ESF http://ec.europa.eu/esf/main.jsp?catId=33&langId=en (visited 2 September 2014).

[53] E.g., Cases T-264/10 and T-266/10 *Kingdom of Spain v Commission* nyr; and Case T-549/08 *Grand Duchy of Luxemburg v European Commission* [2010] ECR I-2477.

[54] E.g. Regulation (EU) No 1303/2013 laying down common provisions on several funds, including the ERDF and the ESF, [2013] OJ L347/320.

[55] See on this, e.g., Articles 54 and 110 of Regulation (EU) No 1303/2013 laying down common provisions on several funds, including the ERDF and the ESF [2013] OJ L347/320.

[56] Council Decision of 21 October 2010 on guidelines for the employment policies of the Member States [2010] OJ L308/46, guideline 7.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Strategy. The policy subjects they can connect to are all fields in which the EU has coordinative competence.

The regulatory technique falls between procedural obligations (the collecting of information, exchange of practices) and that of coordination (setting of common objectives and policy guidelines). They are clearly distinctive from the coordination as provided by the Open Method of Coordination, since they lack the governance structure. For instance, the performance of Member States is not measured by indicators or monitored by country reports that are reviewed by the Commission and Council. These initiatives are not adopted by EU legislators (the European Parliament and/or Council), instead they are adopted by the Commission (e.g. voluntary EU quality framework) and the European Council (declaration on guiding principles on active ageing). The aim of these instruments is to stimulate the Member States to prioritise these subjects in their national policies. As such it can be concluded that the Commission and the European Council function in their capacity as moving spirits.

These instruments have an indirect effect on the policies and legislation of the Member States. At best they have the effect that the issues are prioritised by the Member States, however the extent to which the Member States undertake the actions proposed by these instruments is at their discretion. These instruments themselves hold no monitoring or compliance mechanisms. Instead they try to persuade the Member States to comply by offering support, by gathering information, by technical assistance and by financial support via one or several funds. The latter can be very persuasive, since money itself is a strong incentive and, as analysed in the previous section, the use of EU funding can have a significant impact on the policy objectives supported by it.

III.iii The Legal Integration Capacity of the *Acquis Communautaire* for Social Security

The overall impression from the above analysis of the legal integration capacity of the instruments of the *acquis communautaire* in the area of social security is that it is relatively weak, since most of the parameters manifest themselves in the upper part of the analytical model. There are two things that stand out in the above analysis though. The integration technique they all use is that of coordination and the effect on the national legal order of the instruments is indirect. This applies to all instruments, including the hard coordination regulation, with the exception of the equal treatment instruments, which are based on the integration technique of 'minimum harmonisation' and have a direct effect on the national legal orders.[57]

This *acquis* appears to be imbued with an awareness of common problems in the wider field of social security, with the EU considered to be the most appropriate level to address these problems, in particular by setting the common objectives and policy guidelines to achieve those objectives. In fact, what the EU appears to have created with the Social Investment Package is a laboratory for policy experimentation to find out what will work best to face the common problems Member States encounter in the

[57] See more in more detail on equal treatment and opportunities, BP ter Haar and P Copeland, 'What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy' (2010) 16(3) *European Law Journal* 273–291.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

wider field of social security. Member States are persuaded to participate by the funds that are made available in this field. Once a Member State opts for this funding, its activities are seriously scrutinised by the Commission. By evaluating the funded activities against the background of the policy guidelines and common objectives, the Commission is able to identify what works and what does not. This knowledge can be exchanged between the Member States and used to further develop the policy guidelines. The latter is of particular interest for the policy fields of the Social Investment Package that are directly related to the European Employment Strategy (active inclusion and indirectly active ageing) and Europe 2020 (investing in children and poverty and social exclusion).

IV. HYBRID STRUCTURES WITHIN THE SOCIAL INVESTMENT PACKAGE AND BETWEEN THE SOCIAL INVESTMENT PACKAGE AND THE ECONOMIC DIMENSION OF EUROPE 2020

In this section we will analyse the interaction of the instruments that are used to govern the seven policy fields of the Social Investment Package. Such analysis is interesting since the type of interaction is influential on the integration capacity of the *acquis* as a whole. For this analysis we build on the theory of hybrid structures, which acknowledges the coexistence of different integration instruments in one policy field. Moreover, it argues that the manner in which those coexisting instruments interact is influential on the integration capacity of the *acquis* of the policy field. Instruments that, for instance, strive for dominance over each other are likely to weaken each other's integration capacities. Such interaction is indicated as rivalry. On the other hand instruments that merge their techniques for the same cause, for example to break the cycle of poverty in order to improve the situation of children, are likely to strengthen each other's integration capacities. Without this merger it will be much harder, if not impossible, to achieve the goal. This interaction is indicated as transformative. If instruments are neither rivalry nor transformative they are complementary to each other. When this is unconscious it is unlikely to have any impact on the integration capacity; they are simply not conflicting with each other. When this is consciously designed they are likely to have a positive impact on each other's strengths, however they are still operating independently from each other. Their interaction is not an essential requirement to achieve the goal, but it is also not meaningless.

That the policy fields within the Social Investment Package are related and overlap has already been analysed in Section II and has been worked out in Figure 9.1. In this section we focus on the relationship between the instruments that are used to govern those policy fields. After all it is these instruments that are designed to influence the policies and legislation of the Member States. Since the interest of this contribution lies with the Open Method of Coordination as one of the main drivers of the coordination of social security, our analysis takes the different Open Method of Coordination as a starting point. First we will analyse how the different forms of the Open Method of

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Coordination (the European Employment Strategy, the social Open Method of Coordination and the youth Open Method of Coordination) that are part of the *acquis* of the Social Investment Package are related to each other. Secondly, we will analyse how the funds are related to these forms of Open Method of Coordination; and thirdly, how the other voluntary guiding instruments are related to the Open Method of Coordination. We conclude with an overall analysis.

IV.i Analysis of the Hybrid Structure between the Different Forms of the Open Method of Coordination

The Social Investment Package itself is part of Europe 2020, whose governance structure with the European Semester is an Open Method of Coordination. This Open Method of Coordination sets out the main objectives, among which is inclusive growth. To achieve this objective, policy guidelines are adopted in the field of employment. In addition flagship initiatives are introduced, among which is the Platform against Poverty and Social Exclusion. It is in this overarching governance structure, and in particular that of the Platform, that the next governance layer is adopted through the overarching programme of the Social Investment Package.[58] All policy fields of the Social Investment Package make use of one or more forms of the Open Method of Coordination, if not directly, then indirectly. The fields of active inclusion, social innovation, poverty and social inclusion are directly linked to the social Open Method of Coordination. The field of homelessness is indirectly linked to the social Open Method of Coordination. Active inclusion is also directly related to the European Employment Strategy, whereas investing in children, active ageing, and social services of general interest are indirectly related to the European Employment Strategy. Investing in children is directly linked to the Youth Pact, which is part of the youth Open Method of Coordination.

The social Open Method of Coordination and the European Employment Strategy are related in the sense that the last policy guideline of the employment guidelines is in fact the poverty guideline of the social Open Method of Coordination. Furthermore, they have overlapping objectives, such as the active inclusion of the unemployed by use of active labour market policies, public employment services and lifelong learning strategies. They are different though in their general focus. The focus of the European Employment Strategy is on the labour market and how to improve this by growth (entrepreneurship and flexible employment relations) and better jobs (employment security and life-cycle sensitive working conditions, including active ageing). The focus of the forms of the social Open Method of Coordination is on European citizens who live in deprived situations, and as such covers society as a whole and not only the labour market. Because of these different focuses the European Employment Strategy and forms of the social Open Method of Coordination are not rival. However, they are also not merging into a transformative hybrid and are therefore complementary to each other. This complementarity started unconsciously, since their developments were completely separate. The development of the forms of the social Open Method of

[58] See for this also Figure 9.1 in Section II of this chapter.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Coordination is partly situated in the development of human rights and EU citizenship.[59] The European Employment Strategy is developed in the context of the economic and financial integration of the EU as set out in the Commission's White Paper, *Growth, Competitiveness, Employment*.[60] Since the Lisbon Strategy in 2000 the European Employment Strategy and forms of the social Open Method of Coordination have been brought under the same policy framework and this has continued under Europe 2020.[61] With the introduction of the Social Investment Package it can be argued that the overlapping elements between the European Employment Strategy and the forms of the social Open Method of Coordination have been yoked together even more consciously. Being more conscious of the overlapping goals and distinctive approaches to achieve those goals, these two forms of the Open Method of Coordination are likely to enforce each other's strengths.

The youth Open Method of Coordination is yoked into the Social Investment Package by the policy field of investing in children. The youth Open Method of Coordination itself includes nine policy fields (which are called 'action fields') with a panoply of EU integration instruments governing those fields.[62] The youth Open Method of Coordination is adopted by a framework resolution.[63] This resolution is well aware of other integration instruments dealing with youth issues or that should deal with youth issues. These include the European Employment Strategy and the social Open Method of Coordination. The link to these types of Open Method of Coordination is made in two ways: first, directly through the specific action fields of employment and entrepreneurship, and social inclusion; and second, by initiatives to mainstream youth issues in both types of Open Method of Coordination. Because the European Employment Strategy and the social Open Method of Coordination do not explicitly mention the youth Open Method of Coordination, this relation appears to be in one direction only. As such the hybridity appears weaker than that between the European Employment Strategy and the social Open Method of Coordination, however, it is certainly not rival. There is conscious complementarity from the youth Open Method of Coordination to the European Employment Strategy and the forms of social

---

[59] K Armstrong, 'Tackling Social Exclusion Through Open Method of Coordination: Reshaping the Boundaries of European Governance', in T Börzel and R Cichowski (eds), *The State of the European Union* (Oxford University Press 2003); AF Urritia and NP Beltrán, 'European Employment Strategy and European Social Inclusion Policy: Employment as a Means of Social Inclusion in an International Human Rights Perspective', in R Blanpain (ed), *Employment Policies and Multilevel Governance* (Kluwer Law International 2009) 65–104.

[60] European Commission, White Paper, *Growth, Competitiveness, Employment: The Challenges and Ways Forward into the 21st Century* [1993] COM 700. See on the development of the European Employment Strategy also B Riel and A Metten, *De keuzes van Maastricht. De hobbelige weg naar de EMU* (Van Gorcum 2000); and more specifically on the European Employment Strategy, J Goetschy, 'The European Employment Strategy: Genesis and Development' (1999) (5)2 *European Journal of Industrial Relations* 117–137.

[61] See on this also Section II.

[62] B ter Haar and P Copeland, 'The Increment Integration of EU Youth Policy via Soft Law and Open Methods of Coordination', in B ter Haar, *Open Method of Coordination* (University of Leiden 2012) 125–146 (chapter 7).

[63] European Council, *Resolution on a renewed framework for European cooperation in the youth field (2010–2018)* [2009] OJ 2009 C311/1.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

Open Method of Coordination, whereas this complementarity seems to be unconscious from the European Employment Strategy and the forms of the social Open Method of Coordination to the youth Open Method of Coordination. In terms of the integration effect it is likely that the youth Open Method of Coordination has a positive effect on the European Employment Strategy and the social Open Method of Coordination. It is less likely that the European Employment Strategy and the forms of the social Open Method of Coordination have a positive effect on the integration capacity of the youth Open Method of Coordination, but they will also not downplay it.

IV.ii Analysis of the Hybrid Structure between the Open Method of Coordination and the Funds

Two of the four funds that are part of the *acquis communautaire* of the Social Investment Package also underpin the European Employment Strategy and the forms of the social Open Method of Coordination. The ESF[64] does this in a general manner since it is 'Europe's main instrument for supporting jobs, helping people get better jobs and ensuring fairer job opportunities for all EU citizens'.[65] PROGRESS underpins Europe 2020 and with that five areas in particular, among which are employment, social inclusion and social protection. FEAMD supports actions of the Member States to provide material assistance to the most deprived. This includes materials like food, clothing and other essential items for personal use.[66] The website of the Commission stresses that this material assistance needs to go hand in hand with social inclusion measures. This is an indication of a merger between the forms of the social Open Method of Coordination and FEAMD. Without each other they will not be able to achieve their common goal: to lift people out of poverty and social exclusion. In Regulation 1080/2006, the objective of the ERDF is defined as 'to help reinforce economic and social cohesion by redressing regional imbalances'.[67] It connects to the European Employment Strategy since it contributes to investments that contribute to creating sustainable jobs and to the forms of the social Open Method of Coordination since it also focuses on investment in health and social infrastructures.

The funds are also related to the voluntary guiding instruments. For example in the field of homelessness only challenges have been defined, however several funds (ESF, FEAMD, ERDF) are used to support actions that face these challenges. With the monitoring and evaluation mechanism of the funds,[68] lessons can be drawn as to which actions are effective and which are not. Hence, it contributes to the development of defining policy guidelines in the field as well as adjustments or further guidelines

---

[64] About 20% of this fund is earmarked to be used for the support of actions related to the social Open Method of Coordination: http://ec.europa.eu/social/main.jsp?catId=961&langId=en (visited 4 September 2014).

[65] http://ec.europa.eu/esf/main.jsp?catId=35&langId=en (visited 4 September 2014).

[66] http://ec.europa.eu/social/main.jsp?catId=1089&langId=en (visited 4 September 2014).

[67] Regulation (EC) No 1080/2006 of the European Parliament and of the Council of 5 July 2006 on the European Regional Development Fund and repealing Regulation (EC) No 1783/1999, [2006] OJ L210/1.

[68] See Section III.ii of this chapter.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

within the Open Method of Coordination that also deal with this issue, in particular the social Open Method of Coordination.

IV.iii Analysis of the Hybrid Structure between the Open Method of Coordination and Voluntary Guiding Instruments

Of the voluntary guiding instruments there are three of particular interest for this analysis, since these are the only ones not directly part of an Open Method of Coordination. The first one is the recommendation on investing in children.[69] In its preamble and by using similar policy guidelines the recommendation makes strong references to the social Open Method of Coordination. For instance, the first of three pillars on which the integrated strategy on investing in children is based is to support parents in the labour market. The underlying idea of this is that employment is the best way out of poverty. If the parents get out of poverty, through work, there is a good chance that a child's cycle of poverty gets broken. This is the same approach as the social Open Method of Coordination and has been promoted by the Open Method of Coordination on social inclusion since the mid-2000s.[70]

The connection between the guiding principles on active ageing and the Open Method of Coordination goes one step further. Besides using similar policy objectives as found in the European Employment Strategy and the social Open Method of Coordination, there is also an institutional connection between the guiding principles and the Open Method of Coordination. The Social Protection Committee (established to support the implementation of the social Open Method of Coordination) and the Employment Committee (established to support the implementation of the European Employment Strategy) are both involved in the elaboration of the guiding principles. Although there is no fund connected to the guiding principles, this is indirect via the European Employment Strategy and the social Open Method of Coordination.

The final instrument that it is important to mention in this context is the Commission Communication on services of general interest.[71] This Communication sets out a new policy framework with guidelines developed in the context of the Lisbon Strategy and its economic and social sides. The social elements in these guidelines, again, mirror the policy suggestions of the European Employment Strategy and the social Open Method of Coordination on these issues. It is supported by PROGRESS, which also underpins the European Employment Strategy and the social Open Method of Coordination and where activities are supported that overlap, experiences can feed back into one form of the Open Method of Coordination.

---

[69] Commission Recommendation of 20 February 2013 *Investing in children: breaking the cycle of disadvantage* [2012] OJ L59/5.

[70] E.g. Commission and Council, *Joint Report on Social Protection and Social Inclusion* (European Commission, 2007) 52–53 on tackling child poverty.

[71] European Commission, *Communication on Services of general interest, including social services of general interest: a new European commitment* [2007] COM 725.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

IV.iv Analysis of the Hybrid Structure between Forms of the Social Open Method of Coordination and EU Economic Governance

One final aspect to consider with respect to hybridity and the social *acquis communautaire* is how the latter relates to the reforms surrounding the EU's economic governance. In other words, developments within the social dimension do not operate in isolation from the broader macro-economic developments of the EU. The Eurozone crisis has initiated significant changes to the EU's macro-economic policy and its coordination. While the governance of the European Employment Strategy was incorporated into the re-launched Lisbon Strategy with the other forms of the social Open Method of Coordination operating on the margins of the process, Europe 2020 is significantly different. On a first level, forms of the social Open Method of Coordination have been incorporated into the mainstream governance process (under the banner of the poverty and social exclusion target of Europe 2020) which thereby attempts to strengthen the links between the policy areas and the European Employment Strategy. In this respect country-specific recommendations can and have been issued in the area of poverty and social exclusion, albeit they are strongly linked to developments within the European Employment Strategy. On a second level the governance process of Europe 2020 specifically aims to strengthen the links between macro-economic policy and developments within the employment and social situations of the Member States. It is worth briefly explaining some of the main policy changes relating to this issue.

As part of the Europe 2020 Strategy, the European Semester commences with the Commission's new Annual Growth Survey, which outlines the EU's economic priorities for the following 12 months. On this foundation, governments formulate and submit their medium-term budgetary and economic strategies for peer review prior to national parliamentary approval. This is achieved through the 'simultaneous' but 'separate' reporting and evaluation of Europe 2020 with the EU's fiscal framework, the Stability and Growth Pact (SGP). Despite drawing on separate legal provisions, the coordination of the Europe 2020 National Reform Programmes (NRPs) and the Stability and Convergence Programmes (SCPs) of the SGP aim to strengthen the linkages and relationship between the fiscal situation within the Member States, the broader macro-economy, and selected Europe 2020 thematic issues (such as micro-economic and employment/social areas). During the formulation of both the NRPs and the SCPs, governments engage in bilateral negotiations with the Commission to ensure that they remain 'on track' with respect to the budgetary and macro-economic situation.

The adoption of Europe 2020 dovetailed with preparations to strengthen the SGP. To finalise the governance arrangements around the European Semester, in September 2010 the European Commission proposed the strengthening of the SGP and new economic governance in the form of the 'Six-Pack'. This involved a set of six legislative acts – five regulations and one directive – intended to make governance more rigorous within the EU.[72] The Six-Pack was approved by both the European Council and the Parliament at the end of 2011 with the aim of reducing public deficits and addressing macro-economic imbalances.

[72] C Degryse, *The New European Economic Governance* (European Trade Union Institute 2012) no 14.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

The EU's new governance architecture therefore emphasises fiscal and budgetary discipline as the EU's number one priority. If Member States are in breach of the SGP and running 'excessive' budget deficits or debt, they will be required to reduce these levels until they fall within the benchmarks. Since social expenditures of the Member States are a substantive part of their budgets, country-specific recommendations within the macro-economic pillar of the EU's new economic governance are therefore able to impact on the forms of the social Open Method of Coordination by limiting government spending. This new form of hybridity between economic policy on the one hand and social policy on the other therefore aims at a broader system of governance, which impacts upon the social policies of the Member States.

IV.v Overall Analysis of the Hybrid Structure of the *Acquis Communautaire* Social Investment Package

With the exception of two instruments, the forms of the social Open Method of Coordination and FEAMD, which form a transformative hybridity, all other instruments are complementary to each other. This complementarity is the strongest between the European Employment Strategy and forms of the social Open Method of Coordination, and between the European Employment Strategy and the forms of the social Open Method of Coordination on the one hand, and the funds on the other. The voluntary guiding instruments also interact with the European Employment Strategy and the forms of the social Open Method of Coordination. They do so either by referring to them (instrumental level) or on the level of content via overlapping objectives and policy guidelines. The Open Method of Coordination, however, does not refer to these voluntary guidelines. For two of them this is understandable since they are recent, but this is different for the Communication on services of general interest. Apparently, other instruments are able to connect with different instruments such as the Open Method of Coordination, whereas this is harder the other way around. This could partly be explained by the fact that the Open Method of Coordination itself is a type of strategy setting out a full policy programme including common objectives and policy guidelines. As such it functions as a magnet attracting more elaborated policies tapping in on parts of its objectives and policy guidelines.

The funds appear to strengthen the interaction between the Open Method of Coordination and the voluntary guiding instruments by supporting the same policy activities. Although this appears not to be the result of a conscious design, it is a form of complementarity, which plays to the strengths of these instruments. Via the monitoring and evaluation mechanisms of the funds, both instruments can benefit from the lessons learned from the practices supported by the funds. Metaphorically speaking the funds could be considered as the oil between the Open Method of Coordination and the voluntary guiding instruments, making their interaction work more smoothly.

When considering hybridity in the wider context of the European integration process in general and that of Europe 2020, this may be less harmonious. With Europe 2020 a hybrid system is created between the EU's economic and social objectives, with economic policy under the banner of budgetary and fiscal discipline being the dominant priority. Consequently, social issues are addressed from two different perspectives within Europe 2020 which are potentially conflicting. Firstly, social issues are

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

addressed in respect of budget deficits, which often put pressure on social expenditures as being a substantial part of the budget, involving social security benefits and investments to improve the situation of the most deprived persons. Secondly, investments are promoted within the social policy track purely, of which the Social Investment Package is the most prominent. With the dominance of the economic policy and its considerably stronger governance structure in the SGP (harmonising regulations and a directive in the Six-Pack, which have a direct effect on the national legal orders), the social policies are subordinated to economic policies in two ways: by priority and by governance structure.[73]

V. CONCLUSIONS

We began our analysis with a historical account of the development of 'soft coordination' in the field of social security. This revealed that the field is widely developed, albeit indirectly with reference to the social security of social protection. This has developed via two pathways: the first in the frame of human rights and EU citizenship; and the second in the frame of the postmodern activation paradigm of the European Employment Strategy. This indirect approach to the area has witnessed the development of a policy coordination agenda on poverty and the combating of social exclusion, initially under the Lisbon Strategy, and then continued by its successor: Europe 2020. With a considerably weak legal basis in the EU Treaties, the forms of the social Open Method of Coordination on poverty and social exclusion, health care and pensions have remained vulnerable to political change in priorities and political views.

Having an oversight of the subjects and EU initiatives to promote these subjects, we were able to identify the instruments that are mostly used to govern the area. These include several forms of the Open Method of Coordination, EU funds, recommendations and declarations defining problems, and establishing policy guidelines to deal with those issues. Our analysis of the potential legal integration dynamics confirmed the weak legal status of these instruments. This indicates that although there is considerable activity in the field, none of it is likely to have the effect of harmonising the Member States' policies in the area of social security issues. However, when considering the initiatives in hybridity to each other, this conclusion may have to be reconsidered. The manner in which the different policy fields and governance initiatives are related to each other is rather coherent and consistent, making the subjects more tangible. Furthermore, by using the Open Method of Coordination as the main form of governance of the Social Investment Package as well as its wider context in Europe 2020, other initiatives, in particular the funds and initiatives that set guidelines, are coordinated.

Thus soft coordination by means of the Open Method of Coordination can be considered as a positive contribution since it is able to create coherence and consistency on two levels – by subjects and by governance. However, when this is reviewed in the wider context of Europe 2020 as we have done in the third and fourth sections, this appears less promising than it looks. In the broader context of Europe 2020 the EU's

[73] P Copeland and M Daly, 'Poverty and Social Policy in Europe 2020: Ungoverned and Ungovernable' (2014) 42(3) *Policy and Politics* 351–365.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

economic and fiscal governance in the SGP and by the 'Six-Pack', is dominant. Between the economic objectives and the social objectives there is an almost inherent conflict of interest. Whereas the economic objectives are strongly focused on the budget deficits of the Member States, they affect the social objectives since they comprise a substantial part of the budget. When budgets need to be cut to meet the deficit standards, this affects the social expenditures that are part of, for instance, the Social Investment Package. Consequently, the governance of soft coordination in the field of social security is subordinate to the stronger and more dominant logic of economic integration. In order for social security interests to be protected and promoted, in particular from the point of view of human rights, stronger coordination is needed: either by its own agenda, or more feasibly, by equal coordination of the economic and social objectives of Europe 2020.

BIBLIOGRAPHY

Abbott, KW, RO Keohane, A Moravcsik, A-M Slaughter and D Snidal (2000), 'The Concept of Legalization', *International Organization* 421–456.

Armstrong, K (2003), 'Tackling Social Exclusion through Open Method of Coordination: Reshaping the Boundaries of European Governance', in T Börzel and R Cichowski (eds), *The State of the European Union*, vol 6, Oxford: Oxford University Press.

Armstrong, K (2010), *Governing Social Inclusion. Europeanization through Policy Coordination*, Oxford: Oxford University Press.

Armstrong, K (2012), 'The Lisbon Agenda and Europe 2020: From the Governance of Coordination to the Coordination of Governance', in P Copeland and D Papadimitriou (eds), *Evaluating the EU's Lisbon Agenda*, Basingstoke: Palgrave Macmillan.

Ashiagbor, D (2004), 'The European Employment Strategy and the Regulation of Part-time Work', in S Sciarra, P Davies and M Freedland (eds), *Employment Policy and the Regulation of Part-time Work in the European Union. A Comparative Analysis*, Cambridge: Cambridge University Press 43–52.

Barnard, C (2006), *EC Employment Law* (3rd edition), Oxford: Oxford University Press.

Büchs, M (2007), *New Governance in European Social Policy: The Open Method of Coordination*, Basingstoke: Palgrave Macmillan.

Copeland, P and M Daly (2014), 'Poverty and Social Policy in Europe 2020: Ungoverned and Ungovernable' *Policy and Politics* **42**(3) 351–365.

Curtin, D (2006), 'European Legal Integration: Paradise Lost?', in D Curtin et al (eds), *European Integration and Law*, Antwerp: Intersentia, 1–56.

D'Aspremont, J (2008), 'Softness in International Law: A Self-Serving Quest for New Legal Materials' *European Journal of International Law* **19**(5) 1075–1093.

Daly, M (2006), 'EU Social Policy after Lisbon' *Journal of Common Market Studies* **44**(3) 461–481.

Dawson, M (2011), *New Governance and the Transformation of European Law. Coordinating EU Social Law and Policy*, Cambridge: Cambridge University Press.

De Búrca, G and J Scott (eds) (2006), *Law and New Governance in the EU and the US*, Oxford: Hart Publishing.

De la Porte, C (2002), 'Is the Open Method of Coordination Appropriate for Organising Activities at European Level in Sensitive Policy Areas?' *European Law Journal* **8**(2) 38–58.

De la Porte, C and J Pochet (eds) (2002), *Building Social Europe through the Open Method of Co-ordination*, Brussels: PIE-Peter Lang.

Degryse, C (2012), *The New European Economic Governance*, *European Trade Union Institute working Paper* no14, Brussels: ETUI.

Dehousse, R and JHH Weiler (1990), 'The Legal Dimension of Integration', in W Wallace (ed), *The Dynamics of European Integration*, London: The Royal Institute of International Affairs 242–260.

European Commission (1993), *Growth, competitiveness, employment: the challenges and ways forward into the 21st century*, COM(93)700, Brussels: European Commission.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

European Commission (1997), *Modernizing and improving social protection*, COM(97) 102, Brussels: European Commission.
European Commission (1999), *A concerted strategy for modernizing social protection*, COM(1999) 347, Brussels: European Commission.
European Commission (2002), *Communication on streamlining the annual economic and employment policy coordination cycles*, COM(2002)487 final, Brussels: European Commission.
European Commission (2003), *Communication on strengthening the social dimension of the Lisbon Strategy: streamlining open coordination in the field of social protection*, COM(2003) 261 final, Brussels: European Commission.
European Commission (2004), *Communication on strengthening the implementation of the European Employment Strategy*, COM(2004) 239 final, Brussels: European Commission.
European Commission (2005), *Communication on working together for growth and jobs. A new start for the Lisbon Strategy*, COM(2005) 24, Brussels: European Commission.
European Commission (2006), *Communication concerning a consultation on action at EU level to promote the active inclusion of the people furthest from the labour market*, COM(2006) 44 final, Brussels: European Commission.
European Commission (2010), *Communication on Europe 2020 – A strategy for smart, sustainable and inclusive growth*, COM(2010), Brussels: European Commission.
European Commission (2013), *Communication. Towards social investment for growth and cohesion – including implementing the European Social Fund 2014–2020*, COM(2013) 83 final, Brussels: European Commission.
European Council (2000), *Presidency Conclusions*, Lisbon: European Commission.
Goetschy, J (1999), 'The European Employment Strategy: Genesis and Development' *European Journal of Industrial Relations* **5**(2) 117–137.
Heidenreich, M and J Zeitlin (eds) (2009), *Changing European Employment and Welfare Regimes*, London: Routledge.
Riel, B and A Metten (2000), *De keuzes van Maastricht. De hobbelige weg naar de EMU*, Assen: Van Gorcum.
Room, G (1995), *Beyond the Threshold: The Measurement and Analysis of Social Exclusion*, Bristol: Policy Press.
Scharpf, F (2002), 'The European Social Model: Coping with Challenges of Diversity' *Journal of Common Market Studies* **40**(4) 645–670.
Senden, L (2004), *Soft Law in European Community Law*, Oxford: Hart Publishing.
Ter Haar, BP (2009), 'The Growing Potential Integration Capacity of the European Social Model' *European Integration online Papers*.
Ter Haar, BP (2012), *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe*, Leiden: Leiden University Press, Dissertation, University of Leiden.
Ter Haar, BP and P Copeland (2010), 'What are the Future Prospects for the European Social Model? An Analysis of EU Equal Opportunities and Employment Policy' *European Law Journal* **16**(3) 273–291.
Ter Haar, BP and P Copeland (2011), *EU Youth Policy: A Waterfall of Softness*, *Onderzoeksmemorandum HSZ* no 2, Leiden: University of Leiden.
Ter Haar, BP and P Copeland (2012), 'The Increment Integration of EU Youth Policy via Soft Law and Open Methods of Coordination', in BP ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe*, Leiden: Leiden University Press 125–146 (chapter 7).
Trubek, DM, P Cottrell and M Nance (2006), '"Soft Law", "Hard Law" and EU Integration', in G De Búrca and J Scott (eds), *Law and New Governance in the EU and the US*, Oxford: Hart Publishing 65–94.
Trubek, DM and JS Mosher (2003), 'New Governance, EU Employment Policy, and the European Social Model', in J Zeitlin and DM Trubek (eds), *Governing Work and Welfare in a New Economy*, Oxford: Oxford University Press, 36 ff.
Trubek, DM and LG Trubek (2003), *Hard and Soft Law in the Construction of Social Europe*, Paper prepared for presentation at SALTSA, OSE, UW Workshop on Opening the Open Method of Coordination, Florence: European University Institute.
Urritia, AF and NP Beltrán (2009), 'European Employment Strategy and European Social Inclusion Policy: Employment as a Means of Social Inclusion in an International Human Rights Perspective', in R Blanpain (ed), *Employment Policies and Multilevel Governance*, Alphen a/d Rijn: Kluwer Law International 65–104.
Vink, MP (2002), 'Negative and Positive Integration in European Immigration Policies' *European Integration online Papers*, vol 6, http://eiop.or.at/eiop/pdf/2002-013.pdf.
Zeitlin, J and P Pochet (eds) (2005), *The Open Method of Coordination in Action*, Brussels: PIE Peter Lang.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 12:21:08PM
via University of Liverpool

10. Equal treatment: The EU approach

Susanne Burri

I. INTRODUCTION

Equal treatment is a multifaceted and multi-layered concept, in particular in EU law. EU equal treatment legislation and case law is extensive and complicated, in particular in the field of social security. EU equal treatment law has developed since 1957, with the first provision on equal pay between men and women and a prohibition of discrimination based on nationality in the EEC Treaty. Nowadays, the principle of equal treatment is enshrined in many Treaty provisions (both in the Treaty on European Union (TEU) and in the Treaty on the Functioning of the European Union (TFEU)), in the European Charter of Fundamental Rights and in diverse directives. Member States have in addition their own national legal systems, with often an important role for their Constitution in addition to Labour Code provisions and specific sex equality and/or anti-discrimination Acts. They also have obligations based on international treaties, in particular UN and ILO Treaties. The accession of the EU to the European Convention on Human Rights raises even more questions on the interplay between the Court of Justice of the EU (hereafter: Court of Justice or Court) and the European Court of Human Rights (ECtHR). The European Social Charter (ESC) is also relevant. At the core of all these legal instruments and their interpretation by courts and supervisory committees are different conceptualisations of the principle of equality. The scope of legal instruments, in particular in EU law, mirrors the limited objectives and competences of the EU and the difficulties in reaching agreements within the EU institutions. Issues of growing importance, such as an increasing need for care in an ageing society, are not (yet) addressed in EU legislation, even if some directives include provisions on the reconciliation of work and care. But there are even more weaknesses and inconsistencies in the existing EU equal treatment legislation.

This chapter offers an analysis and critical assessment of the *acquis communautaire* on equal treatment. This contribution aims at discussing some implicit assumptions of EU equality concepts, limits of EU equal treatment law, gaps in legislation and inconsistencies in case law. However, strong points in the light of the aims of EU legislation will be highlighted as well, in addition to pending initiatives. Attention is also paid to the potential of the EU Charter and some UN Treaties. Given the limited scope of this chapter, no attention is paid to national law, ILO Treaties and the other European systems such as the ECHR and the ESC. The focus is on EU equal treatment law in employment, as the issue of women and social security is dealt with in Chapter 11 of this volume. This chapter on equal treatment deals with the discrimination

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

grounds mentioned in Article 19 TFEU: sex, racial or ethnic origin, religion or belief, disability and sexual orientation.[1]

II. SCOPE OF EU EQUAL TREATMENT LEGISLATION

The scope of EU equal treatment legislation is rather limited and differs for the various discrimination grounds.[2] The consequence is that some issues are not addressed at all in EU law, for example age discrimination in statutory social security regulations and the supply of goods and services. The reason for differences in scope is partially historical as sex equality[3] directives have been adopted since 1975 and most of them have been amended since. The extensive interpretation by the Court of the concept of pay in the equal pay Treaty provision[4] has influenced the scope of, in particular, the directive on occupational social security schemes.[5] The two so-called 2000 Directives, on equal treatment between persons irrespective of racial or ethnic origin (hereafter: the Race Directive) and the Framework Directive also show differences in (material) scope.

II.i Differences in Scope

Article 19 TFEU is an enabling provision, which allows the EU to take action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability and sexual orientation. The material scope is not delimited in this article and this allows the EU in principle to take a broad range of actions. Up to now, the scope of equal treatment legislation in directives has, however, been limited to (access to) employment, social security (both occupational and statutory) and (the access to and supply of) goods and services.

---

[1] The nationality ground is not addressed specifically, as quite different aspects are related to the prohibition of discrimination on the ground of nationality, in particular in relation to third nationals. Additional directives in the field of sex equality and reconciliation issues (in particular Directives 92/95 and 2010/18) are not discussed either.

[2] See for an overview E Ellis and P Watson, *EU Anti-discrimination Law* (Oxford University Press 2012).

[3] Sometimes these directives are called *gender equality directives* and both terms are often used interchangeably. However these are two different concepts: while the term *sex* refers primarily to the biological condition and therefore also the difference between women and men, the term *gender* is broader in that it also comprises social differences between women and men, such as certain ideas about their respective roles within the family and in society, S Burri and S Prechal, *EU*, *Gender Equality Law. Update 2013* (European Commission 2014). See also P Auvergnon (ed), *Genre et droit social* (Bordeaux: Presses Universitaires de Bordeaux 2008); S Burri, 'Un regard critique sur l'approche de genre en droit du travail communautaire', in P Auvergnon (ed), *Genre et droit social* (Bordeaux: Presses Universitaires de Bordeaux 2008) 53–71. In this contribution, the term *sex equality* is used in reference to legislation.

[4] Article 157 TFEU (ex Article 119 EEC Treaty, ex Article 141 EC).

[5] Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes [1986] OJ L 225/40, later repealed by the Recast Directive 2006/54.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

Of all the existing equal treatment directives, the Race Directive 2000/43 has the broadest scope.[6] It applies to all persons in the private and public sector in access to employment, self-employment and vocational training; to employment and working conditions, including dismissals and pay; to membership and involvement in a workers' or a professional organisation; to social protection, including social security and healthcare; to social advantages; to education; and to access to and supply of goods and services. However, differences of treatment based on nationality are not covered.[7]

When we compare the scope of the Race Directive with the existing sex equality directives, the scope regarding employment is similar (see Article 14 of the Recast Directive 2006/54).[8] However, the Race Directive is more precise concerning social security matters, as it explicitly mentions *social protection* (including social security and healthcare) and *social advantages*.

The development of the principle of equal treatment between men and women in social security matters reflects a piecemeal approach, starting in the 1970s, which has led to a complex interplay of legal provisions and case law. The relevant sex equality directives apply now to occupational social security schemes as defined in Chapter 2 of the Recast Directive, which implements some case law of the Court of Justice, in particular on the interpretation of the concept of pay in Article 157 TFEU, which includes occupational schemes.[9] Since 1979, there has been a directive applicable to the principle of equal treatment for men and women in statutory social security schemes.[10] The delimitation between occupational schemes and statutory schemes in relation to sex equality is not easy to make and some Member States, in particular from Eastern and Southern Europe, have, for example, pension systems that cannot easily be defined as either occupational or statutory schemes.[11] This distinction is important as the allowed derogations form the principle of equal treatment differ depending on whether a scheme falls under the concept of pay, the provisions on occupational social security schemes or statutory social security schemes. Such differences are irrelevant in the case of race discrimination, while they are crucial in relation to sex discrimination. However, a specific directive applies to equal treatment of self-employed men and

---

[6] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin [2000] OJ L 180/22.

[7] Article 3. In addition Article 3(2) specifies that the directive is without prejudice to the entry into and residence of third-country nationals and stateless persons.

[8] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) [2006] OJ L 204/23. This Directive repealed Directives 75/117/EEC, 76/207/EEC (amended by Directive 2002/73/EC), 1986/378/EEC (amended by Directive 96/97/EC) and 1997/80/EEC with effect from 15 August 2009.

[9] An issue which was, for example, at stake in the famous Case C-170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607 and Case C-262/88 *Douglas Harvey Barber v Guardian Royal Exchange Assurance Group* [1990] ECR I-1889.

[10] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security [1979] OJ L 6/24.

[11] See on this issue, S Renga, D Molnar-Hidassy and G Tisheva, *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries* (European Commission 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

women (2010/41).[12] Even if the provisions of this directive are rather weak, the scope of the prohibition of sex discrimination seems broader in this respect than the scope of the Race Directive, the latter covering only conditions to *access* to self-employment. It is submitted that there are no good reasons why protection against race discrimination in these fields should differ from protection against sex discrimination. The reasons seem purely historical and lead to inconsistencies in the scope of protection of two discrimination grounds which are both considered to be suspect in many legal systems.

An important difference concerns the prohibition of race discrimination compared to sex discrimination in (access to and) supply of goods and services. In the sex equality Directive 2004/113, the content of media and advertising, and education are explicitly excluded in Article 3(3). Vocational education falls under the Recast Directive, but this would not cover primary and secondary education. However, indirect sex discrimination in education might occur in relation to ostensible religious symbols, such as the veil. The Dutch Institute for Human Rights has published a few Opinions in which pupils of schools felt discriminated against because they were not allowed to wear the veil during gym for example.[13] The Dutch legislation applies to education and according to the Dutch Equality Body this amounts to indirect discrimination on the ground of religion. However, it is submitted that this is a clear example of intersectional discrimination as the grounds racial or ethnic minority, sex and religion intersect in such cases.[14] Currently, only indirect racial discrimination in primary and secondary education would fall under the scope of EU law.

A single reference to multiple discrimination is included in the preamble of the Framework Directive, where it is recognised that women are often victims of multiple discrimination.[15] However, there is no further attention to this concept in EU equal

---

[12] Directive 2010/41/EU of the European Parliament and of the Council of 7 July 2010 on the application of the principle of equal treatment between men and women engaged in an activity in a self-employed capacity and repealing Council Directive 86/613/EEC [2010] OJ L 180/1. In addition, the Recast Directive implements the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, which seems broader than employment. The personal scope of this directive includes self-employed persons (Article 6) and the Member States have specific obligations regarding the provisions of occupational social security schemes for self-employed persons (see Articles 10 and 11).

[13] See Opinions 2013-122 and 2013-17.

[14] See on this issue, for example, E Howard, 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law from the UK' (2009) 4(1) *Journal of Religion and Human Rights* 7–24; E Howard, 'Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-discrimination?' (2011) (6)2 *Journal of Religion and Human Rights* 127–149; T Loenen, 'The Headscarf Debate: Approaching the Intersection of Sex, Religion and Race under the ECHR and EC Equality Law', in D Schiek and V Chege (eds), *European Union Non-discrimination Law. Comparative Perspectives on Multi-dimensional Equality Law* (Routledge-Cavendish 2009) 313–328; T Loenen, 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice', in K Alidadi, M-C Foblets and J Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace* (Ashgate 2012) 103–120.

[15] Para 3.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

treatment law.[16] It is worth mentioning that cases on religious symbols have been decided by both the European Court of Human Rights and the Human Rights Committee, some with different outcomes, even if the facts of the cases were similar.[17] In these cases the principle of non-discrimination and the freedom of religion were at stake. It is submitted that the concept of intersectionality might be useful in highlighting in court all the relevant characteristics and circumstances of a case and taking into account structural forms of discrimination resulting from intersectional discrimination.[18] This concept thus merits further research.[19]

As mentioned above the prohibition of race discrimination applies to the (access to and) supply of goods and services. Sex discrimination is not prohibited in the content of media and advertising. It is, however, clear that sexism is broadly reflected in media and advertising. This is, however, a field where no action from the EU can be expected in the short term. At national level, cases on this issue are rare.[20]

The differences in scope between the Race Directive 2000/43 and the Framework Directive 2000/78[21] are even greater, the latter applying only to (access to) employment. Differences based on nationality and social security and protection are explicitly excluded from the scope of this directive in Article 3(2) and (3). In addition, Member States can exclude the application of the principle of equal treatment in relation to disability and age in the armed forces (Article 3(4)). A proposal is pending which aims at extending the scope of the Framework Directive to the area of goods and services.[22] However, the last time this proposal was discussed in the Council was in 2011 and no progress has been made since in the Council.[23] Member States considered then in particular that competences, the disability provisions and the legal certainty in the directive as a whole had to be discussed. An extension of the scope of the Framework

---

[16] See on this issue and the state of affairs in national law, S Burri and D Schiek, *Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Gender Discrimination?* (European Commission 2009).

[17] See, for example, *Ranjit Singh v France*, Appl No 27561/09 (ECHR, 20 June 2006) and *Bikramjit Singh* Communication 1852/2008 (HRC, 4 December 2012).

[18] See on the added value of this concept in relation to the work of the Dutch Equality Body, S Burri, 'Promises of an Intersectional Approach in Practice? The Dutch Equal Treatment Commission's Case Law', in D Schiek and A Lawson (eds), *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination* (Ashgate 2011) 97–110.

[19] See, for example, E Graham, D Cooper, J Krishnadas and D Herman, *Intersectionality and Beyond. Law, Power and the Politics of Location (*Routledge Cavendish 2009); D Schiek and A Lawson (eds), *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination (*Ashgate 2011); and T Loenen, 'Framing Headscarves and Other Multicultural Issues as Religious, Cultural, Racial or Gendered: The Role of Human Rights Law' (2012) 30(4) *Netherlands Quarterly of Human Rights* 472–488.

[20] See for an overview of sex equality legislation and case law at national level, S Burri and S Prechal, *EU Gender Equality Law. Update 2013* (European Commission 2014).

[21] Council Directive 2000/78/EC of 27 November 2000 establishing a legal framework for equal treatment in employment and occupation [2000] OJ L 303/16.

[22] [2008] COM 426.

[23] Press Release, Council meeting Employment, Social Policy, Health and Consumer Affairs, 1 and 2 December 2011. State of affairs in November 2014.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

Directive in the near future is therefore unlikely. The gaps in protection in EU law mentioned here will therefore probably not be remedied in the short term.

It has been suggested that the differences in scope and thus protection afforded by these directives reflects a hierarchy of grounds.[24] As mentioned, the differences in scope in protection against race and sex discrimination are particularly striking, as it is generally accepted that these grounds are suspect discrimination grounds. Therefore these grounds are the first discrimination grounds mentioned in international and European human rights instruments and both grounds are generally subjected to a strict test: only a few reasons might provide an objective justification for race or sex discrimination. The same might be true, for example, for sexual orientation. However, it would seem that this is much less a case of discrimination based on age, a ground which is not explicitly mentioned in many European and international human rights instruments. The differences between the grounds are reflected in the allowed exceptions, which differ from one ground to another (see Section III). In the EU Charter of Fundamental Rights and Freedoms, a more holistic approach to equality is taken.

II.ii The (Potential) Role of the EU Charter

The common values of the EU as stated in Article 2 TEU provide a promising and ambitious framework. It reads:

> The union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between men and women prevail.

Some of these values are further developed in the Charter of Fundamental Rights of the EU. The Charter, *inter alia*, reaffirms the principle of equality before the law in Article 20. The principle of non-discrimination is firmly embedded in Article 21, which reads:

> 1. Any discrimination based on any ground such as sex, race, colour, ethnic or social rights, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.
>
> 2. Within the scope of application of the Treaties and without prejudice to any of their specific provisions, any discrimination on the grounds of nationality shall be prohibited.

Thus this article prohibits discrimination on any ground and offers potentially a wide protection against discrimination. The Charter also recognises the right to gender equality in all areas, thus not only in employment, and the possibility of positive action for its promotion (Article 23). Furthermore, it also defines rights related to family protection and gender equality, for example. The reconciliation of family/private life with work is an important aspect of the Charter; the Charter guarantees, *inter alia*, the

[24] See, for example, E Howard, 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' (2006) 13(4) *Maastricht Journal of European and Comparative Law* 445–470.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

'right to paid maternity leave and to parental leave' (Article 33).[25] Since the entry into force of the Lisbon Treaty, the Charter has become a binding catalogue of EU fundamental rights (see Article 6(1) TEU), addressed to the EU institutions, bodies, offices and agencies, and to the Member States when they are implementing Union law (Article 51(1) of the Charter). This is an important limit in the potential scope of the Charter.[26] However, the Court of Justice adopted a broad interpretation of the scope of application of the Charter in *Fransson*, where it held that national law that aimed to achieve the goals of a directive is qualified as implementing EU law.[27] Such national measures therefore fall within the scope of Union law and the Charter is applicable to such national legislation.

In addition, the general principle of equal treatment has been recognised and applied by the Court of Justice of the EU in many equal treatment cases. In the famous *Defrenne III* case of 1978, the Court stated that the elimination of sex discrimination belongs to the general principles of EU law, just like the fundamental personal human rights.[28] More recently, the Court considered in *Mangold* that principle of non-discrimination on grounds of age must be regarded as a general principle of EU law.[29] Individuals could rely on this principle in this case against an employer. The Court followed a similar approach in the *Kücükdeveci* age discrimination case.[30]

In the Greek *Chatzi* case, the Court went even further and considered that the principle of equal treatment had implications for the situation of parents of twins.[31] According to the Court:

> [O]bservance of the principle of equal treatment, which is one of the general principles of European Union law and whose fundamental nature is affirmed in Article 20 of the Charter of Fundamental Rights, is all the more important in implementing the right to parental leave because this social right is itself recognised as fundamental by Article 33(2) of the Charter of Fundamental Rights.[32]

The Court considered that parents of twins are in a special situation. It concluded that the Framework Agreement on parental leave[33]

---

[25] See on the significance of the Charter in relation to gender equality, for example, S Koukoulis-Spiliotopoulos, 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Acquis* in Gender Equality' (2010) 1 *European Gender Equality Law Review*; E Ellis, 'The Impact of the Lisbon Treaty on Gender Equality' (2010) 1 *European Gender Equality Law Review* 7–13.

[26] See further the explanations relating to the Charter [2002] OJ C 02 and [2002] OJ C 83-03.

[27] Case C-617/10 *Åklagaren v Hans Åkerberg Fransson* [2013] ECR nyr.

[28] Case 147/77 *Gabrielle Defrenne v Société anonyme belge de navigation aérienne Sabena* [1978] ECR 1365.

[29] Case C-144/04 *Werner Mangold v Rüdiger Helm* [2005] ECR I-09981.

[30] Case C-555/07 *Seda Kücükdeveci v Swedex GmbH & Co. KG* [2010] ECR I-00365.

[31] Case C-149/10 *Zoi Chatzi v Ypourgos Oikonomikon* [2010] ECR I-8489.

[32] Para 63.

[33] The Annex of Directive 2010/18, which repealed Directive 96/34.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

> is not to be interpreted as requiring the birth of twins to confer entitlement to a number of periods of parental leave equal to the number of children born. However, read in the light of the principle of equal treatment, this clause obliges the national legislature to establish a parental leave regime which, according to the situation obtaining in the Member State concerned, ensures that the parents of twins receive treatment that takes due account of their particular needs. It is incumbent upon national courts to determine whether the national rules meet that requirement and, if necessary, to interpret those national rules, so far as possible, in conformity with European Union law.[34]

The general principle of equal treatment as enshrined in the Charter can thus play a role in reconciliation issues, not only at EU level, but also in national law.[35]

In the famous *Test-Achats* case, the Court considered the exception in Article 5(2) of Directive 2004/113 on equal treatment between men and women in access to and the supply of goods and services contrary to Articles 21 and 23 of the Charter.[36] Article 5(2) allowed a derogation from the general rule requiring unisex premiums and benefits. An important argument for the Court was that the derogation was not limited in time.

The Court thus uses the Charter provisions in its interpretation of the principle of equal treatment, even when there is no direct relation with a discrimination ground mentioned in Article 19 TFEU, such as in the *Chatzi* case. In addition, the consequences might be far reaching, in particular when a provision of a directive is considered invalid, as in the *Test-Achats* case. These cases illustrate the role of the Charter in the case law of the Court and its potential to extend the protection of the equal treatment directives. The *Test-Achats* case also illustrates that exceptions to the principle of equal treatment have to be interpreted strictly.

III. EXCEPTIONS

The equal treatment directives allow different exceptions, depending on the ground of discrimination at stake and the area. Some exceptions are quite similar, for example for the racial or ethnic origin and sex grounds.

The Race Directive allows only two exceptions: genuine and determining occupational requirements (Article 4) and positive action (Article 5). There is no case law yet of the Court of Justice on the interpretation of these provisions in relation to racial or ethnic origin. But there is case law on the interpretation of these two exceptions in relation to sex discrimination, which are framed similarly to the provisions in the Race Directive.

The Recast Directive allows three exceptions to the principle of equal treatment, which are similar to the exceptions which were included in Article 2 (2), (3) and (4) of

---

[34] Para 75.

[35] See on the impact of this judgment on Greek legislation and case law, S Koukoulis-Spiliotopoulos, 'Greece' (2014) 1 *European Gender Equality Law Review* 66–69.

[36] Case 236/09 *Association Belge des Consommateurs Test-Achats ASBL and Others v Conseil des ministres* [2011] I-00773. The Court ruled that Article 5(2) is invalid with effect from 21 December 2012 (paras 32–34).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

Directive 76/207. First, the application of a genuine and determining occupational requirement does not amount to discrimination if some conditions are fulfilled. The Recast Directive now stipulates in Article 14(2):

> Member States may provide, as regards access to employment including the training leading thereto, that a difference of treatment which is based on a characteristic related to sex shall not constitute discrimination where, by reason of the nature of the particular occupational activities concerned or of the context in which they are carried out, such a characteristic constitutes a genuine and determining occupational requirement, provided that its objective is legitimate and the requirement is proportionate.

The Court of Justice held that the exception of occupational activities in Article 2(2) of Directive 76/207, which was framed similarly, being a derogation from an individual right laid down in the Directive, must be interpreted strictly.[37] According to the Court of Justice, the exclusion of women from some military units of the Royal Marines fell within the scope of this exception and therefore did not breach Directive 76/207.[38] On the other hand, Germany infringed Directive 76/207 by adopting the position that the composition of all armed units in the *Bundeswehr* must remain exclusively male. The Court found that the derogations provided in Article 2(2) can only apply to specific activities and that such a general exclusion was not justified by the specific nature of the posts in question or by the particular context in which the activities in question are carried out.[39] This case law is also relevant for the interpretation of Article 14(2) of the Recast Directive and will probably also be relevant for the similar exceptions in the Race Directive and in the Framework Directive.

The second exception in the Recast Directive concerns the protection of women, particularly as regards pregnancy and maternity. It is now mentioned in Article 28(1) of the Recast Directive on the relationship to EU and national provisions and reads:

> 1. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

According to the Court of Justice, Article 2(3) of Directive 76/207 – which was exactly the same as Article 28(1) of the Recast Directive – recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, second, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth.[40] The extension of the protection in the second aim mentioned here has been criticised as it perpetuates a motherhood ideology.[41] Recently, the Court in the *Betriu Montull* case unfortunately emphasised once again the role of mothers in this respect, denying rights

---

[37] Case 222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1651[36].

[38] Case C-273/97 *Angela Maria Sirdar v The Army Board and Secretary of State for Defence* [1999] ECR I-07403.

[39] Case C-285/98 *Tanja Kreil v Bundesrepublik Deutschland* [2000] ECR I-69.

[40] Case 184/83 *Ulrich Hofmann v Barmer Ersatzkasse* [1984] ECR 3047 [25].

[41] See, for example, C McGlynn, 'Ideologies of Motherhood in European Community Sex Equality' (2000) 6 *European Law Journal* 29–44.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

to fathers.[42] However, in the very similar *Roca Álvarez* case the Court had emphasised the role of both fathers and mothers as parents.[43] This case law reflects lack of consistency.

The exercise of the rights conferred on women under Article 2(3) cannot be the subject of unfavourable treatment regarding their access to employment or their working conditions. In that light, the result pursued by the Directive is substantive – not formal – equality.[44] This reference to substantive equality is certainly welcome, but there are only few cases in which the Court ruled that the aim of a directive is substantive equality.

The last exception in Article 3 of the Recast Directive relates to positive action (see also Section V.v.) and reads:

> Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

Article 141(4) has not been amended and is now Article 157(4) TFEU. It reads:

> With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.

Article 3 of the Recast Directive replaces Article 2(4) of Directive 76/207. In the first draft of Article 2 the idea of positive action was included in the definition of equal treatment, which was defined as: 'The elimination of all discrimination based on sex or on marital or family status, including the adoption of appropriate measures to provide women with equal opportunity in employment, vocational training, promotion and working conditions.' During the negotiations on this draft article, the reference to appropriate measures was deleted. Positive action has since then been framed in EU law as an exception to the principle of equal treatment, instead of as an integral part thereof. Such approach amounts to formal equality. In addition, another change was made in the provision on positive action with the Treaty of Amsterdam. Whereas Article 2(4) of Directive 76/207 referred to women's opportunities, Article 157(4) TFEU allows positive action for the under-represented sex. However, Declaration 28 stipulated at the time of the adoption of the Treaty of Amsterdam that positive action measures should in the first instance aim at improving the situation of women in working life. We see here a purely symmetric approach to equality (see Section V.i.).

As far as all the exceptions are concerned, the Race Directive and the Recast Directive have what is called 'a closed system of exceptions' as regards direct

---

[42] Case 5/12 *Marc Betriu Montull v Instituto Nacional de la Seguridad Social*, nyr.

[43] Case C-104/09 *Pedro Manuel Roca Álvarez v Sesa Start España ETT SA* [2010] ECR I-08661.

[44] Case 136/95 *Caisse nationale d'assurance vieillesse des travailleurs salariés (CNAVTS) v Evelyne Thibault* [1998] ECR I-2011 [24]–[26].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

discrimination; derogations to the principle of equal treatment are limited to the exceptions just described.[45]

The exceptions in the Framework Directive 2000/78 are partially quite different from the ones described above. Both occupational requirements (Article 4(1)) and positive action (Article 7) are framed similarly to the provisions in the Recast Directive and in the Race Directive. However, there are more exceptions, to begin with a general exception in Article 2(5), which reads:

> The Directive shall be without prejudice to measures laid down by national law which, in a democratic society, are necessary for public security, for the maintenance of public order and the prevention of criminal offences, for the protection of health and for the protection of the rights and freedoms of others.

No other EU equal treatment directive contains quite such an unusual general exception. This exception has also to be interpreted strictly and if measures aim at protecting public health, they have to be coherent.[46] In addition to the exceptions on occupational requirements and positive action, there is a specific exception for churches and other organisations the ethos of which is based on religion or belief. Specific provisions apply to discrimination on the ground of disability and age. The fact that there are more exceptions allowed to discrimination on the ground of religion, disability and age compared with the grounds of race or ethnic origin, sex and sexual orientation might suggest that the EU legislator considered some grounds of discrimination more suspect than others at the time of drafting the 2000 Directives.

In the case of indirect discrimination, justifications may be based on other – unwritten – arguments. The conditions are, then, that the aim pursued is legitimate and the measures to attain that aim are appropriate and necessary (see Section V.iii.).

IV. DEFINITIONS

Some concepts are not defined in EU equal treatment law. This is so in the case of 'race' for example.[47] Sex is not defined either, but the Court considered that discrimination against a transgender amounts to sex discrimination.[48] The concept of religion has not been defined either. The Court of Justice might here use the relevant case law of the European Court of Human Rights in its interpretation of this concept.

The concept of handicap has now been defined by the Court taking into account the definition of the UN Convention on the Rights of Persons with Disabilities, which has

---

[45] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-0394 [22]–[24].

[46] Case C-447/09 *Reinhard Prigge and Others v Deutsche Lufthansa AG* [2011] ECR I-08003 and Case C-341/08 *Domnica Petersen v Berufungsausschuss für Zahnärzte für den Bezirk Westfalen-Lippe* [2010] ECR I-00047.

[47] See E Howard, 'Race and Racism: Why does European Law have Difficulties with Definitions?' (2008) 24(1) *International Journal of Comparative Labour Law and Industrial Relations* 5–30.

[48] Case C-13/94 *P v S and Cornwall County Council* [1996] ECR I-02143.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

been approved by the EU.[49] The Court considered that the UN Convention acknowledges that 'disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others' (preamble sub e) and that Article 1(2) states that persons with disabilities include 'those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The Court of Justice ruled that the concept of 'disability' in the Framework Directive must be understood as referring to a limitation which results in particular from physical, mental or psychological impairments, which in interaction with various barriers, may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers. In addition, the Court considered that it follows from Article 1(2) of the UN Convention that the physical, mental or psychological impairments must be 'long term'.

The Court thus adopted a social model of disability instead of a medical model.[50] The fact that the UN Convention was binding for the EU led the Court to adopt a definition of handicap which is in line with the definition in the UN Convention, even if it had adopted a different, narrower, definition in a previous case.[51] The broader definition of the UN Convention has now to be applied in EU law and offers more protection against discrimination on the ground of disability than the previous definition. The UN Convention on the Rights of Persons with Disabilities is the first UN Convention approved by the EU. It is submitted that other UN Conventions can be a source of inspiration for EU equal treatment law. This is in particular true for the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW). However, it is striking that there is not even a reference to this Convention in the preamble of the Recast Directive. CEDAW is mentioned in the preamble of Directive 2004/113 on the access to and supply of goods and services.[52] But the approaches to sex discrimination in CEDAW and EU law are quite different.

V. CONCEPTS OF DISCRIMINATION

V.i Asymmetric versus Symmetric Approach to Equality

CEDAW prohibits discrimination against women and requires that States Parties take all appropriate measures (Articles 1 and 2). It aims at the recognition, enjoyment and

[49] By Decision 2010/48; Case C-335/11 *HK Danmark, acting on behalf of Jette Ring v Dansk almennyttigt Boligselskab* nyr [36]–[39].

[50] See further LB Waddington, 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in LB Waddington, E Quinn and E Flynn (eds), *European Yearbook of Disability Law* (Intersentia 2013) 169–200.

[51] This case was decided before the EU approved the UN Convention, Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA* [2006] ECR I-06467.

[52] Alongside the ECHR and other UN Conventions in I.ii.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

exercise by women of human rights and fundamental freedoms on a basis of equality of men and women. The approach adopted by CEDAW is thus an asymmetric approach: discrimination against women is prohibited.

By contrast, EU equal treatment law follows a strict symmetric approach, emphasising the principle of equal treatment between men and women.[53] Thus men are also protected against sex discrimination, even if social reality shows that generally speaking women have less power, income and opportunities than men, in particular in relation to employment. The conceptualisation of equality in employment does not take into account the fact that the participation and position of men in employment is much less hampered by responsibilities other than work, such as care.[54] Even if there are some legal instruments in relation to care responsibilities in EU law, the most important being the Pregnancy Directive 92/85 and the Parental Leave Directive 2010/18,[55] the dominant model in employment is a worker without or with only few care responsibilities (see also the contribution of Westerveld, Chapter 11 in this volume). The careers of women are much more often influenced than those of men by family and care responsibilities, for example care for elderly or disabled relatives. The statistics show that women in Europe are over-represented in groups who leave the labour market temporarily or those working part time.[56]

In order to realise not only formal, but also substantive, true and genuine equality in results, the differences in relation to care between men and women are relevant in employment matters.[57] A symmetric approach to equality does not take these differences into account. The same is true for a formal approach to equality when relevant differences are not taken into account.

This having been said, it should be noted that the conceptualisation of discrimination concepts in EU law has contributed to combating discrimination. This is particularly true for the development of the concept of indirect discrimination in the case law of the Court. The definitions of the discrimination concepts are now similar in all equal treatment directives. Defined are direct and indirect discrimination, harassment and sexual harassment. In addition, an instruction to discriminate is also prohibited.

---

[53] See for a comparison of CEDAW and EU equal treatment law, A Wiesbrock, 'Equal Employment Opportunities and Equal Pay: Measuring EU Law Against the Standards of The Women's Convention' in I Westendorp (ed), *Women's Convention Turned 30* (Intersentia 2012) 227–245.

[54] See on this issue, for example, S Fredman and J Fudge, 'The Legal Construction of Personal Work Relations and Gender (2013) 7 *Jerusalem Review of Legal Studies* 112–122.

[55] Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of 89/391/EEC) [1992] OJ L 348/1 and Council Directive 2010/18/EU implementing the revised Framework Agreement on parental leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L 68/13. See on these directives, S Burri and S Prechal, *EU Gender Equality Law. Update 2013* (European Commission 2014) 15–18.

[56] See European Commission, *Employment and Social Development in Europe 2013* (European Commission 2013).

[57] See on the concept of substantive equality, T Loenen, 'Substantive Equality as a Right to Inclusion: Dilemmas and Limits in Law' (1995) 94(2) *American Philosophical Association Newsletter on Law and Philosophy* 63–66.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

V.ii Direct Discrimination

The most recent definitions in the Recast Directive are discussed here by way of example, as there is much more case law on sex discrimination than on the other grounds. Direct discrimination is defined in Article 2(1)(a) of Directive 2006/54 and occurs: '… where one person is treated less favourably on grounds of sex than another is, has been or would be treated in a comparable situation'. This definition suggests that a person who is treated less favourably should be compared to another person who is in a comparable situation. However, in the majority of sex discrimination cases up until now, the Court of Justice has found that there is discrimination when a person has been put at a disadvantage for reasons of being female or male, without engaging in comparisons of the situations. One of the reasons for this is that the issue of comparisons is not always raised by the national court.

In pregnancy cases, a comparison is not required. The Court held that the refusal to appoint a woman because she is pregnant amounts to direct sex discrimination, which is prohibited. The fact that there are no male candidates is not relevant if the reason for not appointing the woman is linked to her pregnancy.[58] In the Recast Directive the EU legislator has made it clear that the less favourable treatment of a woman related to pregnancy or maternity leave is included in the prohibition of discrimination (Article 2(2)(c)). Given the drafting of this provision, it would be interesting to know if a man who is pregnant (a transgender) would also be protected against discrimination based on pregnancy. In many countries no requirement of sterilisation applies anymore to transgenders and thus more men can become pregnant. A well-known example is Thomas Beatie.[59]

Direct discrimination can only be justified by written exceptions. There is thus a closed system of exceptions for race, sex, disability, religion and sexual orientation. However as far as age discrimination is concerned, the test is different (see Article 6 of the Framework Directive). The same is true for sex discrimination in access to and supply of goods and services (see Article 4(5) of Directive 2004/113). This is again a clear example of how complicated and multifaceted the system in the different directives is. For each ground of discrimination there are different possibilities to justify direct discrimination and these might even differ from one area to the other as is the case for direct sex discrimination. The question which reasons might justify indirect discrimination is even more complicated.

V.iii Indirect Discrimination

The concept of indirect discrimination has been developed by the Court of Justice in a series of cases, particularly a set of cases regarding indirect sex discrimination in relation to part-time work.[60] The landmark case is *Bilka*, which concerned access to an

---

[58] Case C-177/88 *Elisabeth Johanna Pacifica Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-03941 [15]–[18].

[59] See: http://en.wikipedia.org/wiki/Thomas_Beatie.

[60] See RC Tobler, *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law* (Intersentia 2015) and S Burri and H Aune,

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

occupational pension scheme.[61] According to this scheme, part-time employees could obtain pensions if they had worked for at least 15 years full time over a total period of 20 years. The Court of Justice found that if a much lower proportion of women work full time than men, the exclusion of part-time workers would be contrary to Article 119 EEC (now Article 157 TFEU), where, taking into account the difficulties encountered by women workers working full time, that measure could not be explained by factors that exclude any discrimination on grounds of sex. The measures could, however, be objectively justified if they corresponded to a real need on the part of the undertaking, and were appropriate and necessary to attain that aim. The same objective justification test has been applied in many different Court of Justice judgments and is now included in the definition of indirect discrimination in all the equal treatment directives.

Indirect discrimination is defined in Article 2(1)(b) of Directive 2006/54 as follows:

> … where an apparently neutral provision, criterion or practice would put persons of one sex at a particular disadvantage compared with persons of the other sex, unless that provision, criterion or practice is objectively justified by a legitimate aim, and the means of achieving that aim are appropriate and necessary.

The indirect discrimination test, therefore, comprises the following elements. The first major question to be answered is whether a measure disadvantages significantly more persons of one sex than the other. It is for the applicant to prove that a measure or a practice amounts to indirect discrimination.[62] In *Seymour* the Court provided more guidance on how to establish such a presumption or *prima facie* case of indirect discrimination.[63]

When there is a *prima facie* case of indirect discrimination the defendant has to provide an objective justification for the indirect discriminatory criterion or practice. Indirect discrimination can be justified if the aim is legitimate and the measures to attain that aim are appropriate and necessary. The arguments put forward have to be specific, and supported by evidence. For example, in *Seymour* the Court considered that mere generalisations concerning the capacity of a specific measure to encourage recruitment are not enough to show that the aim of the disputed rule is unrelated to any discrimination based on sex; in addition, it was necessary to provide evidence on the basis of which it could reasonably be considered that the means chosen were suitable for achieving that aim. The Court also considered in *Roks* that

> although budgetary considerations may influence a Member State's choice of social policy and affect the nature or scope of the social protection measures it wishes to adopt, they cannot themselves constitute the aim pursued by that policy and cannot, therefore, justify discrimination against one of the sexes. Moreover to concede that budgetary considerations may justify a difference in treatment as between men and women which would otherwise constitute indirect discrimination on grounds of sex, … would be to accept that the

---

'Sex Discrimination in Relation to Part-Time and Fixed-Term Work' (2014) 1 *European Gender Equality Law Review* 11–21.

[61] Case 170/84 *Bilka-Kaufhaus GmbH v Karin Weber von Hartz* [1986] ECR 1607.

[62] Case 109/88 *Danfoss* [1989] ECR 3199 [10]–[16] and case 381/99 *Brunnhofer* [2001] ECR I-04961 [51]–[62].

[63] Case C-167/97 *Seymour-Smith and Laura Perez* [1999] ECR I-00623 [58]–[65].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

> application and scope of as fundamental a rule of Community law as that of equal treatment between men and women might vary in time and place according to the state of the public finances of the Member States.[64]

This is a very important consideration of the Court of Justice in matters of statutory social security, as in the *Roks* case a statutory social security scheme was at stake falling under Directive 79/7. However, sometimes the indirect discrimination test applied in social security matters is less strict and amounts to a reasonableness test, as for example in *Nolte*.[65] The Member States have a broad margin of discretion in this field. Nevertheless, in some cases, the Court critically assesses the arguments put forward in the light of the aim of a measure and concludes that there is no objective justification in case of indirect sex discrimination.[66]

The development of the concept of indirect discrimination has meant that a step has been taken towards a more substantive approach to equality, because it focuses on the effect of a rule or a practice and takes into account everyday social realities. This concept thus reflects the multi-layered and multifaceted dimension of the concept of equality. However, the concept of indirect discrimination means only a step towards substantive equality, as true genuine equality requires that even further steps are taken in order to realise equality in social conditions.[67]

V.iv Comparability Issues

According to the Court discrimination involves the application of different rules to comparable situations or the application of the same rule to different situations.[68] Sometimes the issue of comparability might be problematic and have the effect that rights are denied to claimants. In the judgment *Österreichischer Gewerkschaftsbund*, for example, the Court considered that unpaid periods of leave due to military service and such periods due to parental leave were not comparable.[69] The Court ruled that 'in the present case, parental leave is leave taken voluntarily by a worker in order to bring up a child. The voluntary nature of such leave is not lost because of difficulties in finding appropriate structures for looking after a very young child, however regrettable such a situation may be.' The Court emphasised that the performance of national service, on the other hand, corresponds to a civic obligation laid down by law and is not governed by the individual interests of the worker.[70] The Court ruled that in each case, the suspension of the contract of employment is based on particular reasons, more

---

[64] Case 343/92 *De Weerd and others* [1994] ECR I-571 [35]–[36] and case C-226/98 *Jørgensen* [2000] ECR I-2447 [37]–[42].

[65] Case C-317/93 *Nolte* [1995] ECR I-04625.

[66] Case C-123/10 *Brachner* [2011] ECR I-10003.

[67] See further T Loenen, 'Indirect Discrimination: Oscillating between Containment and Revolution', in T Loenen and PR Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives* (Kluwer Law International 1999) 195–211.

[68] See Case C-342/93 *Gillespie* [1996] ECR I-00475 [36].

[69] Case C-220/02 *Österreichischer Gewerkschaftsbund, Gewerkschaft der Privatangestellten v Wirtschaftskammer Österreich* [2004] ECR I-5907.

[70] Paras 60–61.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

precisely the (individual) interests of the worker and family in the case of parental leave and the collective interests of the nation in the case of national service. As those reasons are of a different nature, the workers who benefit are not in comparable situations.[71] Therefore the regulation at stake was not contrary to the principle of equal pay between men and women. The public/private divide is clearly reflected in the approach of the Court in this case and fails to take into account the context of lacking child care facilities. In the formal approach taken by the Court, unequal treatment of unequal cases is not problematic. A substantive approach to equality might arguably sometimes require positive action.

V.v Positive Action

Positive action is allowed for all the discrimination grounds mentioned in Article 19 TFEU. However, there is only case law in relation to positive action for women. Positive action is defined in Directive 2006/54 (Article 3) as follows:

> Member States may maintain or adopt measures within the meaning of Article 141(4) of the Treaty with a view to ensuring full equality in practice between men and women in working life.

The measures permitted under the positive action provisions are those designed to eliminate or counteract the prejudicial effects on women in employment or seeking employment which arise from existing attitudes, behaviour and structures based on the idea of a traditional division of roles in society between men and women. The measures should, in particular, encourage the participation of women in various occupations in those sectors of working life where they are currently under-represented.[72]

One of the means to achieve this end is to set targets or even quotas in recruitment and promotion, which, however, must be proportionate to the aim pursued. According to the Court of Justice a measure that would give automatic and unconditional preference to one sex is not justified in this respect. In the case of recruitment and promotion, targets and/or quotas can only be accepted if each and every candidature is the subject of an objective assessment that takes the specific personal situations of all candidates into account. This case law of the Court of Justice started with the rather severe judgment in *Kalanke*, which reflects a formal approach to equality.[73] In the meantime, the Court of Justice has softened its position in favour of positive action.[74]

---

[71] Para 64.

[72] See, for example, S Fredman, 'Changing the Norm: Positive Duties in Equal Treatment Legislation' (2005) 12 *Maastricht Journal of European and Comparative Law* 369; S Fredman, *Making Equality Effective: The Role of Proactive Measures* (European Commission 2009); G Selanec and L Senden, *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards* (European Commission 2011).

[73] Case 450/93 *Kalanke* [1995] ECR I-03051. See T Loenen and A Veldman, 'Preferential Treatment in the Labour Market after Kalanke: Some Comparative Perspectives' (1996) 12 *International Journal of Comparative Labour Law and Industrial Relations* 43–53.

[74] Case 476/99 *Lommers* [2002] ECR I 02891. See also Case 158/97 *Badeck* [2000] ECR 2000 I-01875 and Case 319/03 *Briheche* [2004] ECR I-08807.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

In *Lommers*,[75] for instance, the Court found that measures that gave preference to female employees in the allocation of nursery places, but did not amount to a total exclusion of male candidates, were justified. Preferential allocation of nursery places to women employees was likely to improve equal opportunities for women since it was established that they were more likely than men to give up their careers in order to raise a child. Although, on the one hand, the case was decided in favour of positive measures, on the other hand, it also illustrated the potential dangers of positive action, in the sense that it continues to stereotype women as care-givers.

A proposal is pending on gender balance on company boards. The proposal sets a minimum objective of a 40 per cent representation for the under-represented sex among companies' non-executive directors. It would require companies with a lower representation to introduce pre-established, clear, neutrally formulated and unambiguous criteria in selection procedures for those positions, in order to attain that objective. A deadline would be set for 2018 (public sector) and 2020 (private sector). The directive would expire by the end of 2028. Non-listed companies and SMEs would be excluded, and Member States would also be able to exclude companies employing less than 10 per cent of the under-represented sex.[76] If the proposal were accepted, which is not yet certain, it would be the first time that EU legislation required specific positive action measures from the Member States. Such an approach seems in line with Article 4 CEDAW, which allows for temporary special measures aimed at accelerating *de facto* equality between men and women.[77] CEDAW also imposes an obligation on States Parties to combat gender stereotypes in Article 5. While case law of the Court sometimes recognises the negative impact of gender stereotypes,[78] EU equal treatment legislation does not address prejudices and negative stereotyping yet explicitly. Article 5 CEDAW might in this sense be a source of inspiration.[79]

V.vi Harassment and Sexual Harassment

The EU directives explicitly prohibit harassment, which is defined similarly in all the equal treatment directives adopted since 2000. The sex equality directives prohibit in

---

[75] Case 476/99 *Lommers* [2002] ECR I-02891.

[76] [2012] COM 614. See for more information: http://libraryeuroparl.wordpress.com/2013/11/14/gender-balance-on-company-boards/, accessed 24 November 2014.

[77] See on the compatibility of this Article and the EU positive action approach, LB Waddington and L Visser, 'Article 4 – Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?' in I Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks and Prospects* (Intersentia 2012) 95–107.

[78] See Case C-409/95 *Marschall* [1997] ECR I-06363 [79].

[79] See, for example, HMT Holtmaat and RC Tobler, 'Convention on the Elimination of all Discrimination Against Women and the European Union's Policy in the Field of Combating Gender Discrimination' (2005) 12(4) *Maastricht Journal of European and Comparative Law* 399–425, and HMT Holtmaat, 'Article 5 Convention on the Elimination of all Discrimination Against Women', in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women; a Commentary* (Oxford University Press 2012) 141–167.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

addition sexual harassment.[80] Both concepts are defined and both forms of discrimination cannot be objectively justified. A prohibition of harassment in relation to race discrimination also applies to (statutory) social security matters, but this is not the case for harassment based on sex and sexual harassment. Sexual harassment is not prohibited in the Framework Directive. This can also be considered a gap in protection in relation to the ground of sexual orientation, as in particular homosexuals are confronted with harassment of a sexual nature more often than heterosexuals.[81] The protection against harassment can probably fill this gap. There is no case law yet of the Court of Justice on the concepts of harassment or sexual harassment.

V.vii Instruction to Discriminate

The prohibition on discrimination includes an instruction to discriminate against persons on one of the discrimination grounds covered by the anti-discrimination directives. This could, for example, be the case if an employer required that an agency supplying temporary workers only recruit persons of a certain sex for a specific job or no disabled persons. In that case, both the employer and the agency would be liable and would have to justify such discrimination.[82] It should be noted that incitement of discrimination is not explicitly mentioned in the EU directives. There is no case law of the Court of Justice on instruction to discriminate and hopefully the Court will adopt a broad concept, including incitement to discriminate. The Court adopted a broad interpretation in relation to the concept of disability when it decided that discrimination by association was included in the prohibition of disability discrimination.

V.viii Discrimination by Association

In the *Coleman* case, a female worker who had the sole care responsibility for her disabled son was treated unequally in comparison with her colleagues who had no disabled child and she was harassed by her employer.[83] She quit her job, but sued her employer for disability discrimination. The Court considered that the prohibition of direct disability discrimination in the Framework Directive is not limited only to people who are themselves disabled. Where an employer treats an employee who is not himself disabled less favourably than another employee is, has been or would be treated in a comparable situation, and it is established that the less-favourable treatment of that employee is based on the disability of his child, whose care is provided primarily by

---

[80] See further A Numhauser-Henning and S Laulom, *Harassment Related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity* (European Commission 2011).

[81] Recent research in the Netherlands shows, for example, that homosexuals are more often confronted with criminal behaviour and disrespect than heterosexuals, CBS, 'Homoseksuelen voelen zich onveiliger en zijn vaker slachtoffer' [2013] *Webmagazine* available at: www.cbs.nl/nl-NL/menu/themas/veiligheid-recht/publicaties/artikelen/archief/2013/2013-3847-wm.htm, accessed 20 September 2014.

[82] See I Asscher-Vonk, 'Instruction to Discriminate' (2012) 1 *European Gender Equality Law Review* 4–12.

[83] C-303/06 *Coleman* [2008] ECR I-05603.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

that employee, such treatment is contrary to the prohibition of direct discrimination. The Court followed a similar reasoning on harassment. Such interpretation extends the protection afforded by the Directive and implicitly recognises the value of care.[84] The case shows that a formal approach to equality – in this case the situation of Ms Coleman was considered comparable to the situation of a worker who is disabled – might extend the scope of the Directive, provided that the context of a case is taken into account. The *Coleman* case shows the potential difference in result when the context is taken into account. The different approach of the Court on this point compared to the *Österreichischer Gewerkschaftsbund* case described in Section V.iv. is striking. In the latter case the context of lack of childcare facilities was not considered relevant by the Court.

V.ix Reasonable Accommodation

The Framework Directive requires in Article 5 that reasonable accommodation is provided to persons with disabilities. Employers have to take appropriate measures to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer. The burden shall not be disproportionate when it is sufficiently remedied by measures existing in the framework of the disability policy of the Member State. A specific exception on indirect disability discrimination is provided in Article 2(2)(b)(ii), which relates to the duty to provide a reasonable accommodation. A reasonable accommodation can, for example, consist of a reduction of working hours.[85] The question whether such reasonable accommodation also applies to other discrimination grounds, for example religion, has been the subject of research.[86]

V.x Mainstreaming

As already mentioned, equality between men and women is one of the values on which the EU is based (Article 2 TEU). The promotion of equality between men and women throughout the EU is one of the essential tasks of the EU (Article 3(3) TEU). Since the entry into force of the Lisbon Treaty, Article 8 TFEU specifies that:

> In all its activities, the Union shall aim to eliminate inequalities, and to promote equality, between men and women.

This obligation of gender mainstreaming means that both the EU and the Member States shall actively take into account the objective of equality when formulating and

---

[84] See also A Stewart, S Niccolai and C Hoskyns, 'Discrimination by Association: A Case of the Double Yes?' (2011) 20 *Social and Legal Studies* 173–190.

[85] Case C-335/11 *Jette Ring*, nyr [64].

[86] See, for example, E Howard, 'Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law' (2013) 38(3) *European Law Review* 360–375.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

implementing laws, regulations, administrative provisions, policies and activities.[87] Although these provisions do not create enforceable rights for individuals as such, they are important for the interpretation of EU law and they impose obligations on both the EU and the Member States.

Article 10 TFEU contains a similar mainstreaming obligation for all the discrimination grounds mentioned in Article 19 TFEU and reads:

> In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

The Open Method of Coordination is one of the means to mainstream gender equality and the other Article 19 TFEU non-discrimination grounds.[88]

VI. SOME ENFORCEMENT ISSUES

Enforcement of non-discrimination law is of crucial importance, but is generally speaking rather weak as it depends to a great extent on individuals who feel discriminated against and are ready to start proceedings. Proceedings are often long and costly, as legal aid free of charge is not available in many EU countries. In some countries, for example in the Netherlands, anti-discrimination bureaus offer free legal aid.[89]

The prevention of discrimination receives little attention in the EU equal treatment directives. Only the Recast Directive has a specific provision addressing this issue (Article 26), stating that Member States shall encourage in particular employers to take effective measures to prevent discrimination. There are thus no specific obligations in the directives for employers or social partners, for example, to take measures to prevent discrimination. This can be considered a weak point of the equal treatment directives.

However, all the equal treatment directives address specific enforcement issues. This is the case for the burden of proof, which is more lenient in discrimination cases than in labour or civil law. The burden of proof requires that the applicant establishes facts from which it may be presumed that there has been direct or indirect discrimination. The burden of proof then shifts to the respondent, who has to prove that there has been no breach of the principle of equal treatment.[90] A provision on the burden of proof is lacking in the Directive on equal treatment of self-employed persons 2010/41, one more example of the lack of consistency in the protection against discrimination in the

---

[87] See also Article 29 of the Recast Directive 2006/54 and Article 12 of Directive 2010/41 and F Beveridge, 'Building against the Past: The Impact of Mainstreaming on EU Gender Law and Policy' (2007) 32 *European Law Review* 193–212.

[88] See, for example, F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination* (Ashgate 2008).

[89] See www.discriminatie.nl/antidiscriminatiebureaus, accessed 20 September 2014.

[90] See Article 8 of Directive 2000/43, Article 10 of Directive 2000/78, Article 9 of Directive 2004/113 and Article 19 of Directive 2006/54.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

EU equal treatment directives. Hopefully the Court will remedy this omission in its case law.[91]

Other enforcement provisions concern, in particular, access to justice, protection against victimisation, the dissemination of information, the role of social partners and dialogue with NGOs and obligations of Member States to ensure compliance with the principle of equal treatment. The equal treatment directives all require that sanctions, penalties, compensation or reparation have to be effective, proportionate and dissuasive. However the wording differs slightly in the respective provisions.

At national level, equality bodies have an important role in enforcing the EU equal treatment directives. They can, for example, provide independent assistance to victims of discrimination, conduct independent research and make recommendations. EU law requires such an equality body for the grounds of racial or ethnic origin and sex.[92] However – and this is again a gap in EU legislation – no such body is required by the Framework Directive. In many Member States equality bodies or human rights agencies cover all the Article 19 TFEU discrimination grounds and sometimes even more grounds, depending on the national legislation.

VII. CONCLUSIONS

The aim of this chapter was to provide an analysis and critical assessment of the *acquis communautaire* on equal treatment. The analysis illustrates that EU equal treatment law has become a very complicated field of law and shows quite some inconsistencies between the different equal treatment directives. Gaps in protection were identified in relation to the scope of these directives, but also in relation to the exceptions allowed. Exceptions are not only different with regard to the discrimination grounds, but depend also on the field. The strongest protection is found in the Race Directive. There is then a graded scale with the protection against sex discrimination being fairly strong. The Framework Directive 2000/78 offers the least protection as, for example, it does not cover social protection (including social security), nor the access to and supply of goods and services. In addition, a general exception is included in this directive, which is quite unusual in this field of EU law. The exceptions also differ for the different grounds (disability, religion or belief, sexual orientation and age). Generally speaking, the scope of the equal treatment directives is rather limited; social protection issues related, for example, to people residing illegally in an EU Member State are not addressed in these directives. Recently the European Committee on Social Rights (ECSR) considered that shelter must be provided also to adult migrants in an irregular situation, even when they are requested to leave the country.[93] The case illustrates the added value of, for example, the ESC in the field of social protection.

---

[91] There are no cases yet on this issue.

[92] See Article 13 of Directive 2000/43, Article 12 of Directive 2004/113, Article 20 of Directive 2006/54 and Article 11 of Directive 2010/41. There is a European Network of Equality Bodies: Equinet, see www.equineteurope.org.

[93] *Conference of European Churches (CEC) v The Netherlands* Complaints No 90/201 and No 86/2012 (ECSR 11 November 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

The analysis also shows the important role the Court of Justice plays when interpreting the principle of equal treatment. Case law of the Court is often incorporated in directives. This is the case for pregnancy discrimination for example: the Recast Directive makes clear that no comparison is required in this case. The concept of indirect discrimination as developed by the Court allows more hidden forms of discrimination to be addressed. It can be considered as a step towards a more substantive approach to equality, given the fact that a disproportionate disadvantage for a certain group, which results from the application of a neutral criterion, measure or practice, might amount to a presumption of discrimination. The protection afforded depends much on comparability issues and on the application of the objective justification test in indirect discrimination cases. In social security matters, Member States enjoy a broad margin of discretion. The result is sometimes that the disadvantages some vulnerable groups suffer, for example workers with minor part-time jobs, are not remedied. The concept of indirect discrimination is now defined similarly in all the equal treatment directives. The case law of the Court on sex equality has in addition influenced other EU law areas.[94]

A truly substantive conception of equality is rather exceptional in the case law of the Court, the most obvious example of a mere formal approach to equality being the interpretation of the concept of positive action for women. In this field, the Court could have made the difference by adopting an asymmetric and a (more) substantive approach to equality. A substantive approach to equality could potentially be developed by the Court in future case law on positive action for ethnic minorities, specific groups such as Roma, or disabled people for example.

The fact that the EU has approved the UN Convention on the Rights of Persons with Disabilities has been decisive for the interpretation of the concept of disability in EU law, which now reflects a social model, instead of a mere medical model. Such influence cannot (yet) be detected in the case law of the Court in relation to CEDAW, while this Convention with its asymmetric approach and the explicit obligation to combat gender stereotypes could have a positive influence in addressing structural forms of discrimination, for example in relation to part-time work and care responsibilities. The contextual approach taken by the Court in *Coleman* can in this sense be considered as a step towards a recognition of the value of care. In this case, the Court took the care responsibilities of Ms Coleman into account in defining the scope of protection on the ground of disability. A contextual approach can of course also be applied to grounds of discrimination other than disability.

The Court has also relied on the provisions of the EU Charter and this amounts to an extension of the equal treatment protection afforded in the directives. The potential of the Charter merits further investigations and the Court will hopefully fully use the Charter in its future case law. There are some promising cases pointing at such development. Another area which has not been addressed here concerns the consequences of the accession of the EU to the ECHR for the conceptualisation of equality as a human right. In some respects the two Courts address, for example, similar sex

[94] See S Prechal, 'EU Gender Equality Law: A Source of Inspiration for Other EU Law Areas?' (2008) 1 *European Gender Equality Law Review* 8–14.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

discrimination issues differently.[95] Further research into a coherent system of European human rights and social rights, offering the best possible protection against multiple forms of discrimination, forms a challenging prospect.

BIBLIOGRAPHY

Asscher-Vonk, I (2012), 'Instruction to Discriminate' *European Gender Equality Law Review* **1** 4–12, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9.

Auvergnon, P (ed) (2008), *Genre et droit social*, Bordeaux: Presses Universitaires de Bordeaux.

Beveridge, F (2007), 'Building Against the Past: The Impact of Mainstreaming on EU Gender Law and Policy' *European Law Review* **32** 193–212.

Beveridge, F and S Velluti (eds) (2008), *Gender and the Open Method of Coordination*, Dartmouth: Ashgate.

Burri, S (2008), 'Un regard critique sur l'approche de genre en droit du travail communautaire', in P Auvergnon, *Genre et droit social*, Bordeaux: Presses Universitaires de Bordeaux, 53–71.

Burri, S (2011), 'Promises of an Intersectional Approach in Practice? The Dutch Equal Treatment Commission's Case Law', in D Schiek and A Lawson (eds), *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Farnham: Ashgate, 97–110.

Burri, S (2013), 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' *Utrecht Law Review* **9**(1) 80–103.

Burri, S and H Aune (2014), 'Sex Discrimination in Relation to Part-Time and Fixed-Term Work' *European Gender Equality Law Review* **1** 11–21, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/eu_gender_equality_law_update2013_en.pdf.

Burri, S and S Prechal (2014), *EU Gender Equality Law. Update 2013*, Brussels: European Commission, available at: http://ec.europa.eu/justice/gender-equality/files/your_rights/eu_gender_equality_law_update 2013_en.pdf.

Burri, SD and D Schiek (2009), *Multiple Discrimination in EU Law. Opportunities for Legal Responses to Intersectional Gender Discrimination?* European Commission Directorate General for Employment, Social Affairs and Equal Opportunities, Unit G/2, Brussels: European Commission.

Ellis, E (2010), 'The Impact of the Lisbon Treaty on Gender Equality' *European Gender Equality Law Review* **1** 7–13; available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9.

Ellis, E and P Watson (2012), *EU Anti-discrimination Law*, 2nd edition, Oxford: Oxford University Press.

European Commission (2013), *Employment and Social Development in Europe 2013*, Brussels: European Commission.

Fredman, S (2005), 'Changing the Norm: Positive Duties in Equal Treatment Legislation' *Maastricht Journal of European and Comparative Law* **12** 369.

Fredman, S (2009), *Making Equality Effective: The Role of Proactive Measures*, Brussels: European Commission, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9.

Fredman, S and J Fudge (2013), 'The Legal Construction of Personal Work Relations and Gender' *Jerusalem Review of Legal Studies* **7** 112–122.

Graham, E, D Cooper, J Krishnadas and D Herman (2009), *Intersectionality and Beyond. Law, Power and the Politics of Location*, Oxford: Routledge Cavendish.

Holtmaat, HMT (2012), 'Article 5 Convention on the Elimination of all Discrimination Against Women', in MA Freeman, C Chinkin and B Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, Oxford: Oxford University Press, 141–167.

Holtmaat, HMT and RC Tobler (2005), 'Convention on the Elimination of all Discrimination Against Women and the European Union's Policy in the Field of Combating Gender Discrimination' *Maastricht Journal of European and Comparative Law* **12**(4) 399–425.

[95] See S Burri, 'Towards More Synergy in the Interpretation of the Prohibition of Sex Discrimination in European Law? A Comparison of Legal Contexts and some Case Law of the EU and the ECHR' (2013) 9(1) *Utrecht Law Review* 80–103.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

Howard, E (2006), 'The Case for a Considered Hierarchy of Discrimination Grounds in EU Law' *Maastricht Journal of European and Comparative Law* **13**(4) 445–470.
Howard, E (2008), 'Race and Racism: Why does European Law have Difficulties with Definitions?' *International Journal of Comparative Labour Law and Industrial Relations* **24**(1) 5–30.
Howard, E (2009), 'School Bans on the Wearing of Religious Symbols: Examining the Implications of Recent Case Law from the UK' *Journal of Religion and Human Rights* **4**(1) 7–24.
Howard, E (2011), 'Bans on the Wearing of Religious Symbols in British Schools: A Violation of the Right to Non-discrimination?' *Journal of Religion and Human Rights* **6**(2) 127–149.
Howard, E (2013), 'Reasonable Accommodation of Religion and other Discrimination Grounds in EU Law' *European Law Review* **38**(3) 360–375.
Koukoulis-Spiliotopoulos, S (2010), 'The Lisbon Treaty and the Charter of Fundamental Rights: Maintaining and Developing the *Acquis* in Gender Equality' *European Gender Equality Law Review* **1** 15–24, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9.
Koukoulis-Spiliotopoulos, S (2014), 'Greece' *European Gender Equality Law Review* **1** 66–69, available at: http://ec.europa.eu/justice/gender-equality/files/law_reviews/egelr_2014_1_final_web_en.pdf.
Loenen, T (1995), 'Substantive Equality as a Right to Inclusion: Dilemmas and Limits in Law' *American Philosophical Association Newsletter on Law and Philosophy* **94**(2) 63–66.
Loenen, T (1999), 'Indirect Discrimination: Oscillating between Containment and Revolution', in T Loenen and PR Rodrigues (eds), *Non-discrimination Law: Comparative Perspectives*, The Hague: Kluwer Law International, 195–211.
Loenen, T (2009), 'The Headscarf Debate: Approaching the Intersection of Sex, Religion and Race under the ECHR and EC Equality Law', in D Schiek and V Chege (eds), *European Union Non-discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, London/New York: Routledge-Cavendish, 313–328.
Loenen, T (2012), 'Accommodation of Religion and Sex Equality in the Workplace under the EU Equality Directives: A Double Bind for the European Court of Justice', in K Alidadi, M-C Foblets and J Vrielink (eds), *A Test of Faith? Religious Diversity and Accommodation in the European Workplace*, Farnham/Burlington: Ashgate, 103–120.
Loenen, T (2012), 'Framing Headscarves and Other Multicultural Issues as Religious, Cultural, Racial or Gendered: The Role of Human Rights Law', *Netherlands Quarterly of Human Rights* **30**(4) 472–488.
Loenen, T and A Veldman (1996), 'Preferential Treatment in the Labour Market after Kalanke: Some Comparative Perspectives' *International Journal of Comparative Labour Law and Industrial Relations* **12** 43–53.
McGlynn, C (2000), 'Ideologies of Motherhood in European Community Sex Equality' *European Law Journal* **6** 29–44.
Numhauser-Henning, A and S Laulom (2011), *Harassment related to Sex and Sexual Harassment Law in 33 European Countries. Discrimination versus Dignity*, Brussels: European Commission, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm#h2-9.
Prechal, S (2008), 'EU Gender Equality Law: A Source of Inspiration for Other EU Law Areas?' *European Gender Equality law Review* **1** 8–14, available at: http://ec.europa.eu/justice/gender-equality/document/index_en.htm.
Renga, S, D Molnar-Hidassy and G Tisheva (2010), *Direct and Indirect Gender Discrimination in Old-Age Pensions in 33 European Countries*, Brussels: European Commission, available at: http://ec.europa.eu/justice/genderequality/files/conference_sept_2011/dgjustice_oldagepensionspublication3march2011_en.pdf.
Schiek, D and V Chege (eds) (2009), *European Union Non-Discrimination Law. Comparative Perspectives on Multidimensional Equality Law*, London and New York: Routledge Cavendish.
Schiek, D and A Lawson (eds) (2011), *European Non-Discrimination Law and Intersectionality. Investigating the Triangle of Racial, Gender and Disability Discrimination*, Farnham: Ashgate.
Selanec, G and L Senden (2011), *Positive Action Measures to Ensure Full Equality in Practice between Men and Women, including on Company Boards*, Brussels: European Commission, available at: http://ec.europa.eu/justice/gender-equality/files/gender_balance_decision_making/report_gender-balance_2012_en.pdf.
Stewart, A, S Niccolai and C Hoskyns (2011), 'Discrimination by Association: A Case of the Double Yes?' *Social and Legal Studies* **20** 173–190.
Tobler, RC (2005), *Indirect Discrimination. A Case Study into the Development of the Legal Concept of Indirect Discrimination under EC Law*, Antwerp: Intersentia.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

Waddington, LB (2013), 'Equal to the Task? Re-Examining EU Equality Law in Light of the United Nations Convention on the Rights of Persons with Disabilities', in LB Waddington, E Quinn and E Flynn (eds), *European Yearbook of Disability Law*, Antwerp: Intersentia, 169–200.

Waddington, LB and L Visser (2012), 'Article 4 – Temporary Special Measures under the Women's Convention and Positive Action under EU Law: Mutually Compatible or Irreconcilable?' in I Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks and Prospects*, Cambridge-Antwerp-Portland: Intersentia, 95–107.

Wiesbrock, A (2012), 'Equal Employment Opportunities and Equal Pay: Measuring EU Law Against the Standards of The Women's Convention', in I Westendorp (ed), *The Women's Convention Turned 30: Achievements, Setbacks and Prospects*, Cambridge-Antwerp-Portland: Intersentia 227–245.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:57:55PM
via University College London (UCL)

11. Women and social security

Mies Westerveld

I. INTRODUCTION

Does 'the' social security take sufficient account of women? Are its protection schemes sufficiently aimed at safeguarding women's interests? These are the questions I was invited to answer for this handbook on social security law. At the same time I was asked to adopt an unorthodox approach, one that is more reflexive than strictly legal. This request is not without complications. To begin with, there is the normativity of the questions at hand. The question whether and, if so, when, protection schemes take sufficient interest in the position of a certain target group is subjective, and people who write about this usually begin or end their discourse with a personal standpoint. One can wonder whether this is appropriate in a book that is supposed to be a handbook.

The second complication has to do with the combination of the target group (women) and the concept of social security. The legal concept of social security was conceived at a time when the context of labour and social risks was very different from what it is today. This was the case at the time the concept was first 'invented', and it was no different shortly after WW II when social security was implemented as a fundamental right in the Universal Declaration of Human Rights. In order to do justice to the request, I must look for a definition of social security that is broader than the one that is generally used.

The third complication is related to the legal scope. The question must be answered in a book on EU law, which means that the social security schemes in all EU member states might be relevant. That element makes this task extremely complicated if not impossible to fulfil. After all, the EU is now made up of 28 member states, each with its own social security scheme. And a description of 28 schemes would be not only tedious, but also far beyond the scope of one chapter. Of course, one could try to tackle this complication by approaching the member states not as separate entities but as members of a welfare state family. This approach is not without its risks, however. For one thing, the original typology method (ie that developed by Esping-Andersen) has met with strong criticism, especially from a gender perspective (I deal with this issue later on). A second possible approach is from the perspective of EU non-discrimination law. A strong position of women in the labour market and, within this context, the equal treatment of men and women have always been goals of EU social policy, practically since the signing of the Treaty of Rome in 1957. As a result, we now have a vast body of EU law, which is generally referred to as equal treatment law. The period of hard law instruments (roughly 1960–1990) was succeeded by a period in which EU social policy was dominated by soft law. In both periods, the topic of women and social security (hereinafter 'women and …') remained an important focus of EU policymakers. In this chapter, I deal with the two periods successively.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

This chapter is organized as follows. I will first present a theoretical framework in the form of a few notions that are central to this theme (Section II). In Section III, I will describe the development of EU equal treatment law and its impact on social security. In Section IV, I will approach the theme from a broader perspective. In this section, the central notions are gender mainstreaming, and work and family reconciliation policies. In the final section (V), I will return to the central question and try to answer it as well as I can. I will deal with social security in individual national schemes only incidentally, as examples or in the context of research studies by other academics.

II. THEORETICAL FRAMEWORK

In this section I will elaborate on two key notions for this topic: 'women and …' and 'social security' (section II.i). The theme 'women and …' finds its translation in the word 'gender'. The term 'social security' needs clarification, because of the broader definition that I use in this analysis. Section II.ii deals with the issue of welfare state typology and gender.

II.i Gender and Social Security

A central notion for 'women and the law' (any law) is the word gender. Gender is a layered concept that dates back about 50 years. The godfather of 'gender' was a psychoanalyst and gender identity researcher (Robert Stoller) who introduced the word to clarify the phenomenon of being born in a 'wrong body'.[1] In his analysis, Stoller referred to the cultural definition of masculinity and femininity and the subsequent 'agreements' between the sexes about access to the labour market and caring for children and the elderly. That was in 1968. Several years later his approach was criticized by Oakley, who adopted the term as an instrument to call the dominant theory of the 'natural differences' between the sexes into question.[2] Oakley's approach caught on, gender became politically charged and began a turbulent advance. Gender studies were set up in order to explain systems of sexual theory, whereby 'men' and 'women' are socially constituted and positioned in relations of hierarchy.[3] Legal scholars demanded attention for the way the law produces and reproduces gender.[4] Gender and sex are sometimes used interchangeably, but this is, strictly speaking, incorrect. Gender is a wider concept than sex. While sex refers to the biological status, gender also refers to social differences between men and women, as well as ideas about their respective

[1] R Green, 'Robert Stoller's Sex and Gender: 40 Years On', (2010) 39 *Arch Sex Behaviour* 1457–1465.

[2] A Oakley, *Women's Work: The Housewife Past and Present* (Pantheon Books 1974).

[3] AS Orloff, 'Gender', in FG Castles, S Leibfried, J Lewis, H Obinger, C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010) 252–265, with reference to DJ Haraway, *Simions, Cyborgs and Women* (Routledge 1991). Quotation marks in the text.

[4] S Burri, *Tijd delen, Deeltijd, gelijkheid en gender in Europees – en nationaalrechtelijk perspectief* (Utrecht University 2000) with reference to J Scott, 'Gender, a Useful Category of Historical Analysis' in E Weed (ed) *Coming to Terms* (Routledge 1989) 81–100.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

roles within the family and in society.[5] Over the years, gender has also been used as a verb and as an adjective. Social phenomena or laws may have a gender aspect, for example the breadwinner's allowance in social security. They can also be stripped of this aspect, a process referred to as degendering or – when referring to a social phenomenon – degenderization. Gender has also become a legal criterion in the *acquis communautaire* on equal treatment. Article 3.2 of the EC Treaty mentions the obligation of *gender mainstreaming*. And the fight against *gender discrimination* is addressed in the preamble of the Recast Directive.[6]

The second concept that is in need of operationalization is the term social security. In the Anglo-Saxon body of language of the 1980s, social security is defined as 'a system by which the government pays money regularly to people who have no income or only a very small income'.[7] Social security in this sense runs more or less parallel to welfare. Moreover, in this definition social security is approached by looking at the system, which is resurrected 'to do the job', namely to provide security. Another way to approach social security is by looking at its aim. In the, again Anglo-Saxon, Atlantic Charter of 1941, social security is described as a status of 'freedom from fear and want'. Taking this as a starting point, one could define social security *law* as – freely adapted from Eichenhofer – the body of law that is intended to realize this freedom.[8] This legal realization dates back – at least for most Western European countries – to the late 19th century. At that time the German politician Bismarck introduced the first social *insurances* against the classical workers' risks: sickness, disability, old age and death of the breadwinner. After WW II this risk catalogue was complemented with unemployment and health costs, and from there it was implemented in social insurances for residents, as suggested in the British Beveridge Plan. Both types of schemes – that of Bismarck (workers, income-related) as well as that of Beveridge (residents, flat rate) – can be found throughout the EU member states, sometimes in the form of one type or the other and sometimes as a mix of the two.[9] Besides this, most countries operate replacement or supplementary welfare schemes and other means-tested allowances. Social insurances tend to be more beneficial in realizing social security for the recipient as they are non-means tested, while welfare schemes and means-tested allowances provide less protection. Such schemes and allowances fall under the Anglo-Saxon definition of 'handing out money to people who have no or only a very small income'.

For the more generous social insurances, the topic of the recognized risk catalogue is relevant. The original catalogue was developed shortly after WW II and is now outdated. A more recent catalogue can be found on ILO websites. In one of them, social security is formulated as the 'protection that a society provides to individuals and

---

[5] S Burri and S Prechal, 'EU Gender Equality Law, Report for the European Commission', in G Goldscheid (ed), *Gender and Equality Law* (Ashgate Publishing Limited 2013) 141–163.

[6] Recast Directive, 2006/54/EC. On this directive, see footnote 50 *infra*.

[7] Collins Cobuild English Language Dictionary (1987).

[8] E Eichenhofer, *Sozialrecht* (Mohr Siebeck 2007) 7, italics added. Literally: '*Sozialrecht hat soziale Sicherheit zu verwirklichen*'.

[9] For example, the Netherlands, where the workers' schemes (sickness, disability, unemployment) were set up according to Bismarck's model and the resident schemes (old age, death) use Beveridge's model.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

households to ensure access to healthcare and to guarantee income security, particularly in cases of old age, unemployment, sickness, invalidity, work injury, maternity or loss of a breadwinner'.[10] Another ILO document states that social security systems 'provide for basic income in cases of unemployment, illness and injury, old age and retirement, invalidity, family responsibilities such as pregnancy and childcare, and loss of the family breadwinner'. Such benefits are important, in the words of the ILO,

> not only for individual workers and their families but also for their communities as a whole. By providing healthcare, income security and social services, social security enhances productivity and contributes to the dignity and full realization of the individual. What is more, social security systems also promote gender equality through the adoption of measures to ensure that women who have children enjoy equal opportunities in the labour market.[11]

What stands out in most definitions is that, with the exception of maternity provisions (maternity being a health risk), and the clause about 'provisions for families with children', the description seems to be written for employees or work seekers without family responsibilities (in a broad sense, that is apart from childcare). Fudge labels this as 'an exclusion of unpaid care work from the scope of labour law', which is in her view symptomatic of the average labour law scholar. Most of them are unaware of the gendered implications of their analysis. 'Not only does the neo-classical model deny the huge productive contribution that women make through their socially necessary, although unpaid labour', argues Fudge, but 'it ignores the link between production and reproduction'.[12] And about this 'unpaid labour' which is usually another word for unpaid care, Orloff states:

> Care is central to many feminist understandings of gender, reflecting a long-standing feminist concern with the gendered division of labour, unpaid work, domestic labour and social reproduction as central to women's oppression. Mainstream researchers address care principally as a question of women's differences from men, and as a barrier to employment. In contrast, gender analysis considers care as a socially necessary activity, which is not always recognized as such. … Doing care is the source of many women's economic and political disadvantages, but also offers distinctive identifications, resources and ethical commitments.[13]

This short exposé shows two things. It sheds light on the complexity of the relationship between women and social security, and it shows the inadequacy of traditional definitions. In the selection of social risks, most definitions tend to be gender biased. A more useful approach for our topic is one that is unrelated to social risks, such as the one given by the godfather (or at least, one of the godfathers) of labour law, Hugo

---

[10] www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/publication/wcms_067588.pdf.

[11] www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang–en/index.htm.

[12] J Fudge, 'Labour as a "Fictive Commodity": Radically Reconceptionalizing Labour Law', in G Davidov and B Langille (eds), *The Idea of Labour Law* (Oxford University Press 2011) 120–137.

[13] AS Orloff, 'Gender', in FG Castles, S Leibfried, J Lewis, H Obinger, C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010) 252–265.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

Sinzheimer. Sinzheimer stressed that labour law cannot be conceived only as the law governing employment relationships, but has to cover all the needs and risks which have to be met in an employee's life, including the right to employment services.[14] If one replaces the word 'employee' with 'citizen' – thus including pensioners, self-employed workers, work-seekers and carers on welfare – this description has the potential to last for yet another century.

A last development that is worth mentioning is the paradigm shift with respect to labour activation and social security that has taken place in many EU member states. This shift, which has found its translation into what the British call the enabling welfare state, the Germans *der Aktivierende Wohlfahrtsstaat* and the Dutch the *Participatiesamenleving*, has altered the goal of social security from income protection through benefits to income protection through labour – any kind of labour, whether it is a 'real' job (employment), a job at a subsidized workplace or a form of workfare. As is the case with most elements of social security, this development has important gendered implications. What is more, it also has consequences for one of the central questions of this chapter, namely whether the 'protection schemes' of social security are sufficiently aimed at safeguarding women's interests. In fact, this development raises yet another question: what is the definition of a protection scheme?

II.ii Welfare State Typology and Gender

In 1990 Esping-Andersen presented a typology of welfare-state regimes. Based on what he called a 'decommodification index', he divided 18 OECD countries into three categories, which he labelled after the dominant political movements of the twentieth century: liberal, conservative and social democratic.[15] This typology led to the archetypes and character traits shown in Table 11.1.

Two years later, Lewis criticized this approach, identifying two major flaws. In the first place, decommodification is a poor tool for measuring welfare, since the goal of mainstream women's movements has been the ability for women to enter the labour market, not leave it, or in other words: *commodification*. Moreover, by focusing on the labour market, the typology leaves out family policy and caring policies, both of which have a great impact on the ability of women to enter and stay on the labour market.[16] Lewis argued for an alternative method, which also overlooks the way in which the breadwinner model is facilitated, if not stimulated. As an example, she presented the results of a study of the regimes in Sweden, France and Ireland/the UK, which she classified in terms of the breadwinner model as weak, modified and strong,

---

[14] H Sinzheimer, 'Das Wesen der Arbeitsrecht', in H Sinzheimer, *Arbeitsrecht und Rechtsoziologie*, Vol 1 (Bund Verlag 1927).

[15] G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990). Decommodification refers to activities and efforts, generally by the government, that reduce individuals' reliance on the market and their labour for their wellbeing.

[16] S Saxonberg, 'From Defamilization to Degenderization: Toward a New Welfare State Typology' (2013) 47(1) *Social Policy and Administration* 26–49 with reference to J Lewis (ed), *Women and Social Policies in Europe* (Edward Elgar 1993) and D Sainsbury (ed), *Gendering Welfare States* (Sage 1994).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

Table 11.1 Welfare states typology according to Esping-Andersen

	Liberal	Conservative	Social Democratic
Archetype	Anglo-Saxon	Continental Europe	Scandinavia
Decommodification	Low	Medium	High
Entitlements	Strict, means-tested, recipients stigmatized	Earnings-related, status-based	Universal
Benefits	Modest	Medium	High
Public–private mix	Private high Public low	State interferes only when family role exhausted	Public high Private low

Source: G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990).

respectively.[17] 'Strong' or 'weak' are poor indicators of 'women's best interests', however. For that topic, two other, related issues are relevant: the valuing of unpaid work and the sharing of that work. Sweden has come a long way in the approach to the first issue: women are compensated for caring work at market rates. But it has not even touched the second. The division of care responsibilities has not taken place, and as a result working mothers are 'double burdened'. France has also provided women with 'substantial rewards for mothering', albeit as a by-product of its prioritizing of family policy. In France, women have greater choice than in Sweden as to whether to work at home or in the labour market. In Britain, the assumption is that women will be secondary wage earners, and this assumption is reflected by the relatively weak position of women in the labour market and a predominantly dependant rights position within social security. In this regime, it is assumed that the family will provide childcare, and minimal provision is made for maternity leave, pay and the right to reinstatement. Part-time work tends to be precarious with short hours and few benefits, and eligibility for unemployment benefit is firmly linked to recent employment and to availability for work. All of this leads to attendant problems for women who interrupt paid work to care or who need childcare facilities.[18]

Lewis's response provoked many reactions. It inspired Esping-Andersen to add a fourth regime, in which he situated countries with 'a familialistic orientation of the welfare state'. In this regime, the family plays a crucial role as an institution of welfare

[17] J Lewis, 'Gender and the Development of Welfare Regimes' (1992) *Journal of European Social Policy* 159–173. Sweden is an example of a weak breadwinner regime, the UK and Ireland have strong breadwinner regimes and France sits somewhere in the middle (modified breadwinner regime).

[18] J Lewis, 'Gender and the Development of Welfare Regimes' (1992) 2(3) *Journal of European Social Policy* 159–173.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

production and distribution of income and services.[19] The debate also inspired other feminist researchers. Saxonberg mentions as a 'possibly unintended consequence' of Esping-Andersen's typology the great impetus it has given to feminist scholars to develop alternative typologies that do take into account the interaction between social policies and gender relations.[20] However, the ultimate alternative model has not materialized as a result of this impetus. It proved – again in the words of Saxonberg – much easier for feminist scholars to criticize the original typology than to agree on an alternative. On the other hand, the qualification 'familialism' has turned out to be a useful addition, although the term cannot be used as an exclusive criterion. To this end the term is 'too ambiguous'. Moreover, and this quotation also deserves citation, words like refamilization or defamilization do 'not really clearly describe the main goals of mainstream feminist scholars writing on gender, or the goals of mainstream "femocrats", who have used their influence to push for policies that promote greater gender equality'.[21]

As an illustration of 15 years of welfare state typology and gender, four models are shown in Tables 11.2–11.5: the (improved) typology of Esping-Andersen (Table 11.2), the first presentation of Lewis in reaction of this typology (Table 11.3), a typology by Haas made on the basis of a study to childcare facilities (Table 11.4), and an inventory by Daly of research studies in which 'familialism' is a dominant factor (Table 11.5).

---

[19] G Esping-Andersen (ed), *Why We Need a New Welfare State* (Oxford University Press 2002); Analysis in, AI Aybars, 'The European Employment Strategy and the Europeanization of Gender, Equality in Employment' in F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Ashgate 2008) 55–77; M Ferrera, 'The "Southern Model" of Welfare in Social Europe' (1996) 6(1) *Journal of European Social Policy* 17–37; R Trifiletti, 'Southern European Welfare Regimes and the Worsening Position of Women' (1999) 9(1) *Journal of European Social Policy* 49–64; O Salido, *Women's Labour Force Participation in Spain*, *working paper 02-15 Unidad de Politicas Comparads*, Madrid: CSIC, 2002.

[20] S Saxonberg, 'From Defamilization to Degenderization: Toward a New Welfare State Typology' (2013) 47(1) *Social Policy and Administration* 26–49, with reference to J Lewis (ed), *Women and Social Policies in Europe* (Edward Elgar 1993) and D Sainsbury (ed), *Gendering Welfare States* (Sage 1994).

[21] S Saxonberg, 'From Defamilization to Degenderization: Toward a New Welfare State Typology' (2013) 47(1) *Social Policy and Administration* 26–49, 27, quotation marks in text. Earlier, Saxonberg and Sirovátka had offered the following explanation of both adjectives. In their words 're-familization differs from familization, in that familization policies are the general policies a regime pursues, while re-familization connotes a direction', S Saxonberg and T Sirovátka, 'Failing Family Policy in Post-Communist Central Europe' (2006) 8(2) *Journal of Comparative Policy Analysis* 185–202, at 200.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

Table 11.2 Decommodification according to Esping-Andersen

Anglo-Irish	Continental	Southern European	Scandinavian
UK	Austria	Spain	Denmark
Ireland	Germany	Italy	Finland
	France	Portugal	Sweden
	Benelux	Greece	

Source: G Esping Andersen, *The Three Worlds of Welfare Capitalism* (Polity 1990); G Esping-Andersen (ed), *Why we Need a New Welfare State* (Oxford University Press 2002).

Table 11.3 Breadwinner regime according to Lewis

Strong breadwinner	Modified breadwinner	Weak breadwinner
UK	France	Sweden
Ireland		
Mediterranean countries		

Source: J Lewis, 'Gender and the Development of Welfare Regimes' (1992) 2(3) *Journal of European Social Policy* 159–173.

Table 11.4 Childcare according to Haas

Market-oriented	Family-centred	Non-interventionist	Valued care*
UK	Austria	Spain	Denmark
Ireland	Belgium, Luxembourg	Italy	Finland
Netherlands	France	Portugal	Sweden
	Germany	Greece	

Note: *Market-oriented refers to strong traditional values concerning the role of women and men and the importance of mothers devoting themselves to home and children. The policymaking in family-centred societies is shaped by a traditional religious heritage and/or a strong public commitment to the preservation of the traditional family. A non-interventionist (or privatized) care model means that care of young children is a non-collectivized responsibility, done primarily by mothers or extended family members. Valued care refers to the provision of comprehensive support systems for working parents.

Source: L Haas, 'Parental Leave and Gender Equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89–114.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

Table 11.5 Familialism according to Daly

Anti-poverty	Familialism, selective	Familialism, rigid	Egalitarian
UK	Germany	France	Denmark
Ireland			Finland
Mediterranean			Sweden

Source: M Daly, 'Families versus State and Market', in FG Castles, S Leibfried, J Lewis, H Obinger, C Pierson (eds), *The Oxford Handbook of the Welfare State* (Oxford University Press 2010) 130–152.

This inventory shows two things. Esping-Andersen's typology may be more useful to understand gender issues than some feminist critics claim. This might explain why for many academics his typology is, to this day, an uncontested starting point to present their research studies.[22] On the other hand, for the appreciation of gender issues, familialism is a vital additional element, as it accentuates two issues that mainstream studies tend to overlook: (1) when both parents are family breadwinners, how equally divided is the unpaid work within the family home? (2) what is the position of single-parent households in work and family reconciliation policies?

III. SOCIAL SECURITY AND GENDER: FIRST PHASE (1957–1985)

I now return to the history of EU social policy and gender. The first phase of this development is characterized by hard law measures and the formation of the traditional *acquis communautaire.*[23] In this period, EU equal treatment law had a strong impact on the individual social security schemes. This period also witnessed the birth of gender studies, with academic debates about several key notions for the topic 'women and …' .

I will start this section with the coming of age of the EU *acquis* in equal treatment law. After that I deal with the contents of the Social Security Directive – the relevant

[22] See, e.g., A Hemerijck, M Keune and M Rhodes, 'European Welfare States: Diversity', in PM Heywood et al, *Challenges and Reforms* (Palgrave Macmillan 2006) 259–279 in a study on, among other things, the level of social expenditure and taxation in several welfare states. In this study the Scandinavian countries rank high and they are also large employers, *especially for women in the social-service sector*. Moreover, they spend almost twice as much on *family services* as the average amount of the Continental and Anglo-Irish groups, and three times as much as some southern European countries. In terms of employment, the Scandinavian countries far out-perform the other three 'families', and low levels of employment, especially among young people, *women* and the elderly are evident in southern Europe, with Portugal something of an exception.

[23] See also F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Ashgate Publishing Company 2008) 11, 12. Next to this period of *acquis communautaire* they identify: a switch to policy-setting measures; a turn towards mainstreaming policies; and the imposition of obligations on public bodies.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

case law for our topic – and the comments it elicited. Section III.iii. deals with the academic discourse about the central notions of equal treatment law.

III.i The Concepts of the First Three Equal Treatment Law Directives

The EU *acquis* on equal treatment law was triggered by the equal pay clause in the Treaty of Rome. Although many member states initially assumed this provision would have no direct effect on them, Ms Defrenne – or to be more accurate her lawyer Ms Vogel-Polsky – aided by a comparatively activist Court of Justice, soon disabused them of this notion. In an analysis of the history of equal treatment law, Hoskyns puts it this way: 'The potential for a stronger implementation of equal pay was embedded in the history of the article … . It took activist women to realize these possibilities and switch the debate from one of economic rationality to a demand for rights.'[24] For this reason the first *Defrenne* ruling[25] has been called 'the founding moment in the history of gender and the EU'. The case exposed the challenges facing the EU legislation on gender equality and it played a role in the intensification of gender policy in the 1970s, when three new directives were drafted.[26] A second important trail-blazer of equal treatment law was the French sociologist Evelyne Sullerot, who presented two reports, the first in 1968 and the second two years later. The first strongly criticized the lack of attention given to both the paid and the unpaid work that women do.[27] In the second report she convincingly demonstrated the extent to which the labour market was still segregated.[28] In response, the European Commission formulated a Social Action Plan (SAP 1974–1976), which claimed (for the first time) that the Commission can legitimately interfere in issues concerning the distribution of resources and the maintenance of social stability. As a result of this Plan, three directives were accepted: the Directive on Equal Pay (EPD 1975), the Directive on Equal Treatment (ETD 1976) and the Directive on Social Security (1979).

By the time the third directive was being prepared the political engagement of women was already somewhat in decline, which – according to Hoskyns – may explain why no imaginative solutions were presented, for instance about including 'care' in the list of insurable insurance risks, or a commitment to the individualization of entitlement to benefits as an ultimate goal. Not that it would have made any practical difference if this had been the case. Both suggestions would most certainly have been turned down on grounds of costs. But their introduction in early stages would – again according to Hoskyns – have helped to establish what an alternative policy might look like.[29]

Unimaginative or not, the impact of the directive would be large, especially on countries with strong breadwinner schemes. Countries like Germany and France did not

---

[24] C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 57.

[25] Case 80/70 *Defrenne I* [1971] ECR 445.

[26] J Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) 29–30.

[27] E Sullerot, *Histoire et sociologie du travail féminin* (Editions Gonthier 1968).

[28] E Sullerot, *L'emploi des femmes et ses problèmes dans les états membres de la Communauté Européenne* (European Commission 1970).

[29] C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 109.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

expect that they would have to modify their legislation drastically.[30] As negotiations progressed, therefore, various representatives entered into a state of mild panic about what promises were being made in this document. Their objections were strengthened by the fact that the directive was created at a time when the economic recession began to make itself known, so that the necessity, or even the wisdom, of measures aimed at the improvement of the labour market position of women became questionable.[31] In the end, it was decided to exclude occupational pensions from the scope of the directive, as well as death pensions. Also, member states could reserve the right to certain exceptions, such as those concerning the difference in pensionable age between men and women. And finally, a seemingly arbitrary timescale was chosen for the directive's implementation – the longest implementation phase that had yet been given for a directive: six years instead of the usual one or two years.[32] Unsurprisingly therefore, the directive was received with mixed feelings. In a memo to the European Trade Union Confederation, trade union leader and feminist Emilienne Brunfaut wrote that the member states had dictated 'their directives' to the unions. In contrast, the British Commission official who was responsible for the preparation of the Social Security Directive called the acceptance of the directive a victory, 'especially as none of the three major countries really wanted it'.[33]

III.ii Equal Treatment Law and the Social Security Directive: Contents and Case Law

At the point when the Social Security Directive was due to be implemented, the member states already had some experience of interpreting equal treatment law by the Court of Justice and the amount of leeway the Court would allow them in doing this. For feminist equal treatment watchers – academics as well as 'femocrats' – it had been a disappointment that the Court, after the promising *Defrenne* cases, did not follow the European Commission in its efforts to force the member states to abandon the classic breadwinner model. For this reason some authors accused the Court of an 'ideology of motherhood': the belief that all women need to be mothers, that all children need their mothers and that all mothers need their children.[34] This observation was illustrated by a number of court cases in which 'mummy provisions' – such as maternity leave and

[30] Observation, J Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) 37.
[31] Ibid, 36.
[32] C Hoskyns, *Integrating Gender: Women, Law and Politics in the European Union* (Verso 1996) 111: 'Observers comment that the Council became like an auction with member states bidding for certain dates and with the German president picking six years out of the air as the date most likely to command general agreement.'
[33] Ibid.
[34] GC More, '"Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean?' (1993) 1 *Feminist Legal Studies*, and C McGlynn, 'Ideologies of Motherhood in European Community Sex Equality Law' (2000) 6 *European Law Journal* 29–44 with reference to A Oakley, *Women's Work: The Housewife Past and Present* (Pantheon Books 1974).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

leave during a period following an adoption or pregnancy, which were only open to women – remained untouched.[35]

The implicit message – or what they assumed was the implicit message – of the Court's considerations especially irritated feminist equal treatment watchers.[36] For instance, More observed that in effect, the decision in *Hofmann* entrenched the separation of male and female roles, suggesting that only women can have close relationships with their children and implying that only women should look after their children during the first few months of life. And McGlynn wrote that the Court is encouraging women to stay at home with their children at least during the early months, while men continue their uninterrupted careers. 'This in turn leads to a greater emphasis being placed on the father's career while the mother's inevitably slows down.'[37] In *Hofmann*, the Court also delivered a message about the role of equal treatment law and the role of the Court of Justice in interpreting this branch of law. In response to Hofmann's argument that granting parental leave to men would reduce the multiplicity of burdens borne by women, the Court replied that 'the directive is not designed to settle questions concerned with the organization of the family, or to alter the division of responsibility between parents'.[38]

In retrospect, it is interesting to observe that the European Court of Human Rights would make a similar choice a few years later. In *Petrovic*, this Court started its considerations with the observation that, so far as taking care of the child during the said period (several weeks after pregnancy leave), both parents are 'similarly placed'. Nonetheless, the authorities had not exceeded the margin of appreciation allowed to them, since at the material time (end of the 1980s) no common standard existed in this field. The majority of the contracting states did not provide for parental leave allowances to be paid for fathers.[39]

Returning to social security, at the time the Social Security Directive became part of the body of EU law there were three stumbling blocks for women in their quest for equality. The first had to do with the theme 'access'. Like its predecessors, the Social Security Directive offers protection to members of the working population. The Court of Justice enlarged this personal scope somewhat to include those who (albeit under certain conditions) had left the labour market in order to care for another person who was receiving an invalidity benefit.[40] But women who were disadvantaged by a

---

[35] Case C-163/82 *Commission v Italy* [1983] ECR 03273; Case C 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 03047; Case 312/86 *Commission v France* [1988] ECR 06315.

[36] GC More, '"Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean?' (1993) 1 *Feminist Legal Studies*, C McGlynn, 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law' [2001] (Fall) *Social Politics*. For a different view, WC Monster, 'Moederschapsideologie en het HvJEG: een reactie' [The ideology of Motherhood and the ECJ: A Reaction] (2001) 2 *Nemesis*.

[37] C McGlynn, 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law' [2001] (Fall) *Social Politics*, with reference to S Fredman, 'European Community Discrimination Law: A Critique' (1992) 21 *Industrial Law Journal* 119–134.

[38] Case C 184/83 *Hofmann v Barmer Ersatzkasse* [1984] ECR 03047 at 3075.

[39] *Petrovic v Austria* App no 20458/92 (ECHR, 27 March 1998). Like *Hofmann*, this case concerned a rule whereby, unlike mothers, fathers were not entitled to parental leave allowance.

[40] Case 150/85 *Drake v Chief Adjudication Office* [1986] ECR 01995.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

discriminatory rule in the past could only successfully claim discrimination if they had had a connection with the labour market at the time.[41] The directive was not written for the traditional breadwinner's housewife spouse. The second stumbling block from the perspective of gender is the exclusion of social assistance benefits. Social assistance is only included in so far as it is intended to supplement or replace the schemes that are explicitly included. For women, assistance schemes are very often disadvantageous because of the household means test enshrined in the benefit.[42] Last, but certainly not least, is the disadvantage that Hoskyns had already mentioned: a disadvantage not by what was mentioned, but by what was omitted. Care was included nowhere in the directive's risk sphere. The directive only mentioned the classic workers' risks: unemployment, sickness, invalidity and old age, accidents at work and occupational diseases.[43]

The Court of Justice could not, of course, touch such 'omissions'. But apart from this, its course in this area of the law could be – and has been – characterized as 'cautious',[44] which in many instances would favour the member state involved. This was not the case in *Roks and others* though, where the Court stated that 'budgetary considerations cannot in themselves justify discrimination against one of the sexes'. Any other approach would imply that the application and scope of equal treatment might vary in time and place according to the state of the public finances of the member state.[45] But for member states that claimed other than budgetary considerations, the Court would show considerable leniency. Earlier, within the scope of the Equal Treatment Directive, it had declared a less favourable treatment of part-time workers by employers to be indirectly discriminatory.[46] In *Nolte*, the Court seemed to continue on this path by arguing that also persons with employment that is considered 'minor' – in this case, regularly less than 15 hours a week – fall under the personal scope of the directive. Having said that, however, the Court accepted the justification for the exclusion of this employment from a compulsory insurance scheme, as the

---

[41] Cases 48/88, 106/88 and 107/88 *Achterberg te-Riele v Sociale Verzekeringsbank Amsterdam* [1989] ECR 01963; Case 150/85 *Drake v Chief Adjudication Office* [1986] ECR 01995.

[42] Observation by JA Sohrab, 'European Equality Legislation on Social Security', in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing Inc 2000) 107–123.

[43] Article 3 Social Security Directive. Provisions concerning survivors' benefits were excluded as well, as were provisions concerning family benefits, with the exception, again, of family benefits granted by way of increase of a benefit mentioned in Article 3.1 (Art 3.2 Social Security Directive).

[44] Observation by JA Sohrab, 'European Equality Legislation on Social Security', in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing Inc. 2000) 107–123, who ascribes this to 'the delicate and often politically highly sensitive balancing of interest, which this domain of social policy requests'.

[45] Case C-343/92 *Roks and others v Bestuur van de BVG* [1994] ECR I-00571, [1994] 2 CMLR 325.

[46] Case C-170/84 *Bilka Kaufhaus* [1986] ECR 01607; Case C-171/88 *Rinner-Kühn v FWW Spezial-Gebäudereinigung GmbH & Co KG* [1989] ECR 02743.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

arguments that were brought forward served a legitimate goal of social policy.[47] And in *Teuling-Worms*, the Court of Justice declared allowances on a social insurance benefit admissible, provided they are intended as a minimum protection for *families*.[48]

III.iii Sameness versus Difference: A Debate about Preferential Strategies

The development of the EU *acquis* on equal treatment also triggered a debate about preferential strategies, as well as about the question what equal treatment law prescribes, or should prescribe. Should it, in the words of Hoskyns, be directed at formal, law-in-the-books equality, or should its aim be real-life or 'substantive' equality? Others continued on this path, using qualifications such as 'justice' or 'just outcome'. In the USA, where the debate was centred on pregnancy and maternity leave, the notions of 'sameness' and 'difference' were used. Advocates for a sameness approach argued that laws that classify pregnancy as a temporary disability could best protect women. Rhode, for instance, in a defence of the sameness strategy, warned against overrating the importance of pregnancy leave. 'Pregnancy-related policies affect most women workers for relatively brief intervals, while the absence of broader disability, health, child-rearing and caretaking assistance remains a chronic problem for the vast majority of employees, male and female, throughout their working lives.' She also saw potential dangers in a difference-oriented approach. In labour relations this approach may lead to the establishment of special 'mummy tracks', which may in the end turn into 'mummy traps'.[49] Flax, on the other hand, argued that 'equality' is partly constituted in and by denial and ranking of differences, and is for this reason less useful as an antidote to injustice than difference.[50] At a later stage, feminists who called themselves 'post-modern' or 'post-structural' rejected the sameness versus difference dichotomy. In their view, the dichotomy is ineffective in that it suppresses differences *between men* and *between women*, thus ignoring similarities that would be highlighted by categorizing them differently, for example by class or ethnicity. Moreover, both

---

[47] Case C317/93 *Nolte v Landesversicherungsanstalt Hannover* [1995] ECR I-04625. The German government had argued that the exclusion is the only means of satisfying a social demand for such employment and is designed to avoid an increase in unlawful employment and devices circumventing social legislation.

[48] Case 30/85 *Teuling-Worms v Bestuur voor de Bedrijfsvereniging voor de Chemische Industrie* [1987] ECR 02497. Literally: provided the protection is intended for persons who, by virtue of the fact that they have a dependent spouse or children, bear heavier burdens than single persons.

[49] DL Rhode, 'The Politics of Paradigms: Gender Difference and Gender Disadvantage', in G Bock and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 149–163, at 154, with reference to R Spathler-Roth, *Unnecessary Losses: Costs to Americans for the Lack of Family and Medical Leave* (Institute for Women's Policy Research 1990).

[50] J Flax, 'Beyond Equality: Gender, Justice and Difference', in G Bock, and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 93–210.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

criteria embody the notion of a male standard against which 'sameness' and 'difference' are judged.[51]

In the end, three 'approaches of feminism' came out, each with its own strengths and weaknesses: equality (or sameness), which rests on the assumption that social values and standards are gender neutral; difference, which is a critique of equality and of the increased reliance by the economy and the state on women's double presence or dual burden; and post-structural feminism, which deconstructs the social and cultural values of gender, thus allowing feminists to challenge the binary oppositions that support the current gender order.[52]

IV. EU SOCIAL POLICY AND GENDER: SECOND PHASE

By the end of the 1980s, the EU had successfully implemented a body of law that has had great influence on, among other things, social security. Especially member states that had set up their schemes around the breadwinner model were forced to make adjustments. Adjustments are not reforms, however. The underlying question of how social security could or should deal with the fact that the dual earnings model brings about other social risks than the breadwinner model had not been dealt with. That question was postponed for the period to come, when the focus would shift from hard to soft law instruments and from legal obligations to policy-setting measures. Perhaps it is safe to say that, at the dawn of the second phase, the Equal Treatment project in social security had come to an end, and the focus turned to increasing labour participation among women and promoting employment opportunities and equal opportunities in general.

At the same time – and this may be an explanatory factor – the EU was faced with political developments that demanded new measures and unorthodox solutions. For example, the entry of a large number of 'new' member states drew attention to the fact that the political administration was in urgent need of modernization, and the imminent problem of population aging demanded measures to increase labour participation and lower the costs of the welfare state. It is almost impossible to discuss all developments and the associated intentions and measures briefly and in relation to each other; moreover, one can question whether this relation always exists. In this section I will be following a chronological order as far as possible, starting with the continuation of the equal treatment programme from the 1970s and early 1980s, the 'invention' of gender mainstreaming and work–family policies (Section IV.i.), and continuing with the final

---

[51] S Liff and J Wajcman, '"Sameness" and "Difference" Revisited: Which Way Forward For Equal Opportunity Initiatives?' (1996) 33 *Journal of Management Studies* 1996.

[52] Analysis by R Guerrina, *Mothering the Union. Gender politics in the EU* (Manchester University Press 2005), J Flax, 'Beyond Equality: Gender, Justice and Difference', in G Bock, and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 93–210, A Cavarero, 'Equality and Sexual Difference: Amnesia in Political Thought', in G Bock, and S James (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity* (Routledge 1992) 32–48 and L Balbo, 'La doppia presenza' [1978] *Inchiesta* 32.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

period (Section IV.ii.), when gender issues were forced out of the spotlight and into the background of social policy.

IV.i From Equal Treatment to Gender Mainstreaming: 1985–1995

The changes in the socioeconomic climate in the early 1980s were reflected in the equal treatment-oriented Social Action Plans (SAPs) from this period. The second Plan (1986–1990) had a high emphasis on cost control and deregulation and far less emphasis on hard law instruments. Developments concerning proposed equal treatment legislation also stagnated. A proposed directive on positive action was 'demoted', an intended directive on parental leave had to be withdrawn, and the proposed directives on occupational pensions and self-employed women were considerably weakened.[53] After the Social Security Directive 1979, the EU would not initiate any other directives aimed at improving the position of women in social security. In 2006 most equal treatment directives were embodied in the Recast Directive.[54] The Social Security Directive remained as a sole directive and a warning toward all member states that social security (or protection) should be free from discrimination according to sex.

The idea that the position of women is as a rule subordinate to that of men and for that reason alone is deserving of attention, gradually fell out of favour, however. The wording of the successive equal opportunity programmes of this period bears witness to this: the Third Medium-Term Community Action Programme 1991–1995 was entitled 'Equal Opportunities for Women and Men' – the first time that the programme's title had included the words 'and men'.[55] At the same time, the Maastricht Treaty introduced a broader equality agenda, extending from equality between women and men to the elimination of inequality based on sex, racial or ethnic origin, religion or belief, disability, age and sexual orientation. Sex equality became a landmark principle of the Council of Europe, but the focus of equal treatment law was no longer exclusively gendered. The Treaty also constitutionalized the principle of subsidiarity, thus expressing the importance of member states' autonomy. The EU, and consequently the direct impact of EU equal treatment law, seemed to be on the retreat.

The intention to reduce the pay gap and other inequalities between men and women had not disappeared, however. On the contrary, at the 1995 Beijing Women's Conference the concept of gender mainstreaming was introduced, and it was shortly thereafter embraced by the EU as a useful instrument to achieve more gender equality. 'Mainstreaming a gender perspective' is – in the words of the UN Economic and Social Council – 'a process as well as a strategy'. It is a process of assessing the implications

---

[53] Observation by C Hoskyns, 'A Study of Four Action Programmes on Equal Opportunities', in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing 2000) 43–61.

[54] Recast Directive, 2006/54/EC. The pregnant workers and the parental leave directives were excluded from this operation, because of their different legal bases relating to the protection of health: J Kantola, *Gender and the European Union* (Palgrave Macmillan 2010) 114.

[55] Observation by C Hoskyns, 'A Study of Four Action Programmes on Equal Opportunities', in M Rossili (ed), *Gender Policies in the European Union* (Peter Lang Publishing 2000) 43–61, who calls this 'meaningful'.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels; it is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementing, monitoring and evaluating policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated.[56] The EU translated the concept as 'the integration of gender equality considerations in all activities and policies at all levels'.[57] According to Lewis, mainstreaming rests on the idea that policies in pursuit of gender equality should be liberated from the confinement of the equal opportunities 'ghetto', so they can be integrated across all fields of policymaking. From this perspective, mainstreaming has the potential to address disadvantage (the aim of same-treatment policies) without denying difference.[58]

IV.ii Employment Policies and Gender: 1990–2015

Meanwhile, within the domain of employment policies, the Delors White Paper (1993) initiated the instrument of European Employment Strategies (EES), a policy tool that 'invites' member states to set employment targets for the years to come. Many strategies contained special references to the labour market participation of women, but as the years went by this special attention gradually took off. For example, at the 2000 Lisbon Summit, the target for 2010 was for 70 per cent of the labour force to be in employment, and women's employment to be 60 per cent. In the first five-year period of EES (1997–2002), the labour market participation of women was still a predominant focus. A few years later (the Barcelona Mid-term Review, 2002–2005), the central notions were childcare facilities and reconciliation policies. But after this period, specific gender guidelines were absent; all that remained were a few references to the labour market situation of women.[59] The Lisbon Summit also saw the birth of yet another tool of soft law policy, namely the Open Method of Coordination (OMC).

This method rests on soft law mechanisms, such as guidelines and indicators, benchmarking and sharing of best practice. Again, as with most soft policy instruments, there are no official sanctions for laggards. Its effectiveness must come from peer pressure.

---

[56] UN, *Report of the Economic and Social Council*, 1997 (A/52/3, 18 September 1997).

[57] CEC (Commission of the European Communities), *Gender and the National Action Plans on Employment (NAPs)*, Doc. EQOP 56–98, DG V/D/5 (European Commission 1998). Nowadays gender mainstreaming has a legal base in Art 3.3 TEU.

[58] J Lewis, 'Work/family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' (2006) 13(3) *Journal of European Public Policy* 420–437, at 426, with reference to T Rees, *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies* (Routledge 1998).

[59] Observation by AI Aybars, 'The European Employment Strategy and the Europeanization of Gender, Equality in Employment', in F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU* (Ashgate Publishing Company 2008) 55–77.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

But it was not just the employment policy documents that witnessed a waning interest in the position of women: a comparable development can be seen in the successive EU policy documents on gender. After Lisbon, the equal treatment agenda has been reformulated as 'the furthering of all aspects of equal opportunities, including making it easier to reconcile work and family life'.[60] In response to this, the resolution on the 'Balanced participation of women and men in family and working life' identifies two 'gender-based disadvantages': for women with regard to conditions for access to and participation in the labour market, and for men with regard to participation in family life. The document mentions three methods to reduce the disadvantages: (1) by examining the scope for granting working men a right to paternity leave while maintaining their rights relating to employment; (2) by reinforcement measures which encourage a balanced sharing of care for children, the elderly and other dependent persons between working men and women; and (3) where appropriate, by granting specific protection to single-parent families.[61] The succeeding (2006–2010) Roadmap for Equality between Women and Men includes the statement – under the heading 'equal economic independence' – that some of the Lisbon targets relate to the gender dimension, but that 'the efforts to achieve them must be strengthened, *particularly as regards employment and unemployment rates for women*'.[62]

'Social risk' and 'unemployment' appear to have become synonymous and as if to underline this, the Roadmap also observes that 'the risk of poverty is greater for women than for men as they are more likely to have interrupted careers and, therefore, fewer individual pension rights'. 'Social protection schemes should offer them adequate benefits.' The document also contains a section on the reconciliation of private and professional life. Under this heading one finds the observation that women have recourse to the arrangements of reconciliation policies more often (than men) and that this could have a negative impact on their professional position and their economic independence. Finally, in the Community Strategy for equality between women and men (2010–2015), social protection, or the lack thereof, has vanished as a matter of concern altogether. The document only mentions – under the heading 'economic independence of women' – initiatives aimed at (among other things) assessing workers' rights with regard to leave for family reasons and member states' performance with regard to childcare facilities.[63]

On the other hand, the 'fate' of dwindling EU commitment was not restricted to gender issues: most soft policy tools would suffer from a lack of stamina. Hemerijck et al observe that the OMC practices never became fully integrated into domestic policy processes, while the EES encountered opposition as well as disagreement about its targets and the most appropriate means for achieving them.[64] Be that as it may, it was clear to some feminist policy watchers that the EU had lost interest in gender issues

---

[60] 'Balanced participation of women and men in family and working life' [2000] OJ C 218.
[61] [2000] COM 218.
[62] [20006] COM, 92, italics added.
[63] [2010] COM 491.
[64] A Hemerijck, M Keune and M Rhodes, 'European Welfare States: Diversity, Challenges and Reforms', in PM Heywood, E Jones, M Rhodes and U Sedelmeijer (eds), *Developments in European Politics* (Palgrave Macmillan 2006) 259–279.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

and/or substantive equality. Lewis, for instance, observed that the mainstream social and economic policy had become dominated by a 'sound money, sound finance' paradigm, which means, in the area of work/family reconciliation, that 'the business case' rather than gender equality becomes the dominant frame into which arguments for gender quality must fit.[65] And Knijn and Smit believe that the discourse around work and family has been reframed: 'After decades of promoting work-family reconciliation *with the aim of promoting gender equality*, the latter seems to be subordinated to the focus on creating competitive knowledge-based economies in the EU.'[66]

In a less gendered – and consequently (?) less pessimistic – analysis, Hemerijck classifies the development as 'a re-orientation in social citizenship away from freedom from want and towards a freedom to act'. A key policy directive in this approach is, in his view, a high level of employment for both men and women, a combination of elements of flexicurity and security, under the proviso of accommodating work and family life, and a guaranteed rich social minimum. In this concept, the state is key provider for families and labour markets, playing an important role in ensuring adequate services, for example childcare, family services, education and training and active labour market support.[67]

This perspective sounds promising, especially because of addenda such as 'the proviso of accommodating work and family life' and 'adequate services, for example childcare and family services'. But, as in many cases, the proof of the pudding is in the eating. And when one looks at a more concrete level, one finds that the 'reorientation' – or 'business case' – has been translated into a combination of 'enabling' and 'welfare', which means that, with the exception of pensioners and fully disabled persons, social security has lost its former rationale. Its function has shifted from income protection through benefits to income protection through labour, even if it is 'artificial labour' or working for the dole. In these member states, social security has become more about 'quid pro quo'[68] than about social protection. Again, in this perspective, the question 'What about women?' – or better yet, 'What about care?' – remains un-dealt with, or at least neglected.

A remarkable, contrary development has taken place in some Central and Eastern European countries (CEECs). In most of them, state policy under the Communist regime was directed to full labour participation of men and women, which was facilitated by heavily subsidized childcare services. This did not result in an equal

---

[65] J Lewis, 'Work/family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' (2006) 13(3) *Journal of European Public Policy* 420–437, with reference to K Dyson, 'EMU as Europeanization: Convergence, Diversity and Contingency' (2000) 38(4) *Journal of Common Market Studies* 645–666.

[66] T Knijn, and A Smit, 'Investing, Facilitating, or Individualizing the Reconciliation of Work and Family Life: Three Paradigms and Ambivalent Policies' [2009] *Oxford Journals* 484–518 (italics added).

[67] A Hemerijck, 'The Political Economy of Social Investment', in L Burroni, M Keune and G Meardi (eds), *Economy and Society in Europe. A Relationship in Crisis* (Elgaronline 2012) 40–60.

[68] G Vonk, 'Repressive Welfare States: The Spiral of Obligations and Sanctions in Social Security' (2014) 3 *EJSS* 188–203.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

sharing of care, however: as in the Scandinavian countries most women in the CEECs were double burdened.[69] Nor did this situation result in real equality in the division of labour. Czech sociologist Čermáková once called the situation in these countries 'a gender contract, in which both spouses work, but only men have careers'.[70] After joining the EU, several CEECs replaced the dual-earnings model with a traditional male-breadwinner model. Childcare centres had their financial support withdrawn, which led to their closure. The focus shifted to cash benefits and expanded parental leave, encouraging women to stay at home and take care of their children.[71]

IV.iii The Court of Justice and the Social Security Directive; Recent Case Law

Before turning to my conclusions, I return once more to hard law instruments, and more specifically to the Social Security Directive and its influence on national legislation. This directive has produced some case law also in recent years, albeit scarce. First, this case law shows two things. Social security rules, which offer better rights to men than to women, have not vanished altogether, and secondly, in this day and age the Court tends to be less lenient towards such rules than it had been in the 1980s, when some 'femocrats' accused it of being an adherent of an 'ideology of motherhood' (see Section III.ii.). In 2009 the Court rejected an allowance on old-age pensions for pensioners whose income – *that of the spouse included* – remained under a certain minimum amount.[72] Two years later, it did the same with respect to a rule about contribution conditions for old-age pensions, which are stricter for part-time than for full-time workers.[73] Very recently, the Court of Justice was even consulted about a case of direct discrimination. This concerned a method of calculating damages in case of a work-related accident, in which one of the relevant factors is that women live on average longer than men. Not surprisingly, the Court found this inconsistent with the directive as well.[74]

---

[69] M Robila, 'Family Policies in Eastern Europe: A Focus on Parental Leave' (2012) 21 *Journal of Child Family Studies* 32–41, at 35 with reference to S Saxonberg and D Szelewa, 'The Continuing Legacy of the Communist Legacy? The Development of Family Policies in Poland and the Czech Republic' (2007) 14 *Social Politics* 351–379.

[70] S Saxonberg and T Sirovátka, 'Failing Family Policy in Post-Communist Central Europe' (2006) 8(2) *Journal of Comparative Policy Analysis* 185–202, with reference to M Čermáková, 'Postavení žen na thru práce' [1997] 33(4) *Sociologický časopsis* 389–404.

[71] S Saxonberg and D Szelewa, 'The Continuing Legacy of the Communist Legacy? The Development of Family Policies in Poland and the Czech Republic' (2007) 14 *Social Politics* 351–379. M Robila, 'Family Policies in Eastern Europe: A Focus on Parental Leave' (2012) 21 *Journal of Child Family Studies* 32–41 classifies this as 'refamilization', emphasizing that maternity and child rearing are a woman's role.

[72] Case C-123/10 *Brachner v Pensionsversicherungsanstalt* [2011] ECR I-10003.

[73] Case C-385/11 *Isabel Elbal Moreno v Instituto de la Seguridad Social (INSS) and Tesoría General de la Seguridad Social (TGSS)* ECLI:EU:C:2012:746.

[74] Case C-318/13 *X* ECLI:EU:C:2014:213.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

V. WOMEN AND SOCIAL SECURITY: CONCLUSION

I now return to the central questions of this chapter: does the social security take sufficient account of women? And are its protection schemes sufficiently aimed at safeguarding women's interests? I have tried to show why this question is difficult, if not impossible to answer. For one thing, the answer depends on the notion of 'protection schemes', which is embedded in the term 'social security'. For another, the answer is dependent on one's ideological view of social security and its function. Should it give maximum – and equal – income protection to people who are not, were never or are no longer capable of earning a living by performing paid labour (for whatever reason)? Or should the focus be on activation, even if this means a strict reduction of protection? If so, what about the 'free choice' to provide care to dependent family members or other loved ones? And what, if anything, does the answer say about 'women's interests'? Instead of giving a yes or no answer to these questions, I will end with a few observations that may shed some light on a possible conclusion.

My first observation is that the issue of gender and social risk coverage remains unresolved. Not one Welfare State Families member has formulated an adequate response to the fact that a society needs care-givers, that giving care and working for one's living are activities that cannot be done simultaneously, and that giving care is usually an unrewarded activity (in terms of pay, that is).

My second observation is connected to this. Social security has been built around the concept of paid labour, with the result that its 'rewards' tend to go to people who are or have been in paid labour. The best illustration of the consequences of this structure is the social security protection in the post-active period when everything that is earned during one's working life adds up. In 2007, an EU research study confirmed the assumption (which had initiated the study) that in every EU pension regime women are more poorly covered than men. If anything, the report indicates that the social security does *not* take sufficient account of women, and that its protection schemes are not really, or primarily aimed at safeguarding women's interests.

My third observation is derived from the post-structural feminists: there is no such thing as 'the' woman. In other words, the answer to the central question is dependent on the type of woman one is referring to: the career woman, the dual-earning woman, the housewife by choice or the head of a single-parent household.

My final observation concerns the comments on EU social policy that I came across during this study. It seems to me that some equal treatment watchers (or femocrats) suffer from a certain short-sightedness that is induced by wishful thinking. In the 'golden' period of equal treatment law they were disappointed about the course of the EU institutions, which they accused of adhering to an ideology of motherhood and a refusal to do justice to the interests of women. In the post-equal treatment period, the argument is that the discussion around women and work has been reframed: from the desire to give women real equality, to the objective of work and care reconciliation with the sole intention of making ends meet economically. For me it is more likely that social justice and substantive equality have never been at the root of EU social policy and that the only way to achieve such goals is by aiming at smart combinations of 'just outcome' and positive economic results or the promise thereof.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

BIBLIOGRAPHY

Aybars, AI (2008), 'The European Employment Strategy and the Europeanization of Gender, Equality in Employment' in F Beveridge and S Velluti (eds), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU*, Farnham: Ashgate Publishing Company 55–77.

Balbo, L (1978), 'La doppia presenza' *Inchiesta* 32.

Beveridge F and S Velluti (eds) (2008), *Gender and the Open Method of Coordination. Perspectives on Law, Governance and Equality in the EU*, Farnham: Ashgate Publishing Company.

Bock, G and S James (eds) (1992), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity*, London and New York: Routledge.

Burri, S (2000), *Tijd delen, Deeltijd, gelijkheid en gender in Europees- en nationaalrechtelijk perspectief* (diss.) (*Sharing Time. Part-time Work, Equality and Gender in a European and National Legal Perspective*), Doctoral thesis, Utrecht University.

Burri S and S Prechal (2008), 'EU Gender Equality Law, Report for the European Commission', in G Goldscheid (ed), *Gender and Equality Law*, Farnham: Ashgate Publishing Limited 141–163.

Burroni, L, M Keune and G Meardi (eds) (2012), *Economy and Society in Europe. A Relationship in Crisis*, Cheltenham: Elgaronline.

Castles, FG (1995), 'Welfare State Development in Southern Europe' *West European Politics* **18**(2) 291–313.

Castles, FG, S Leibfried, J Lewis, H Obinger, C Pierson (eds) (2010), *The Oxford Handbook of the Welfare State*, Oxford: Oxford University Press.

Cavarero, A (1992), 'Equality and Sexual Difference: Amnesia in Political Thought', in Bock, G and S James (1992) (eds), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity*, London and New York: Routledge 32–48.

CEC (Commission of the European Communities) (1998), *Gender and the National Action Plans on Employment (NAPs)*, Doc. EQOP 56-98, DG V/D/5, Brussels: European Commission.

Čermáková, M (1997), 'Postavení žen na thru práce', *Sociologický časopsis* **33**(4) 389–404.

Daly M (1995), 'Families versus State and Market', in FG Castles (ed), 'Welfare State Development in Southern Europe' *West European Politics* **18**(2) 130–152.

Davidov, G and B Langille (2011) (eds), *The Idea of Labour Law*, Oxford: Oxford University Press.

Dyson, K (2000), 'EMU as Europeanization: Convergence, Diversity and Contingency' *Journal of Common Market Studies* **38**(4) 645–666.

Eichenhofer, E (2007), *Sozialrecht*, Tübingen: Mohr Siebeck.

Esping-Andersen, G (1990), *The Three Worlds of Welfare Capitalism*, Cambridge: Polity.

Esping-Andersen, G (ed) (2002), *Why we Need a New Welfare State*, Oxford: Oxford University Press.

Ferrera, M (1996), 'The "Southern Model" of Welfare in Social Europe' *Journal of European Social Policy* **6**(1) 17–37.

Flax, J (1992), 'Beyond Equality: Gender, Justice and Difference', in Bock, G and S James (eds) (1992), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity*, London and New York: Routledge 193–210.

Fredman, S (1992), 'European Community Discrimination Law: A Critique' *Industrial Law Journal* **21** 119–134.

Fudge, J (2011), 'Labour as a "Fictive Commodity": Radically Reconceptionalizing Labour Law', in Davidov, G and B Langille (2011) (eds), *The Idea of Labour Law*, Oxford: Oxford University Press 120–137.

Goldscheid, G (ed) (2013), *Gender and Equality Law*, Farnham: Ashgate Publishing Limited.

Green, R (2010), 'Robert Stoller's Sex and Gender: 40 Years On', *Arch Sex Behaviour* **39** 1457–1465.

Guerrina, R (2005), *Mothering the Union. Gender Politics in the EU*, Manchester: Manchester University Press.

Haas, L (2003), 'Parental Leave and Gender Equality: Lessons from the European Union' *Review of Policy Research* **20**(1) 89–114.

Haraway, DJ (1991), *Simions, Cyborgs and Women*, London: Routledge.

Hemerijck, A, (2012), 'The Political Economy of Social Investment', in Burroni, L, M Keune and G Meardi (eds), *Economy and Society in Europe. A Relationship in Crisis,* Cheltenham: Elgaronline, 40–60.

Hemerijck, A, M Keune and M Rhodes (2006), 'European Welfare States: Diversity, Challenges and Reforms', in Heywood, PM, E Jones, M Rhodes and U Sedelmeijer (eds) (2006), *Developments in European Politics*, Basingstoke and New York: Palgrave Macmillan 259–279.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

Heywood, PM, E Jones, M Rhodes and U Sedelmeijer (eds) (2006), *Developments in European Politics*, Basingstoke and New York: Palgrave Macmillan.
Hoskyns, C (1985), 'Women's Equality and the European Community' *Feminist Review* **20** 70–88.
Hoskyns, C (1996), *Integrating Gender: Women, Law and Politics in the European Union*, London: Verso.
Hoskyns, C (2000), 'A Study of Four Action Programmes on Equal Opportunities', in M Rossili (ed), *Gender Policies in the European Union*, New York: Peter Lang Publishing 43–61.
Kantola, J (2010), *Gender and the European Union*, London: Palgrave Macmillan.
Knijn, T and A Smit (2009), 'Investing, Facilitating, or Individualizing the Reconciliation of Work and Family Life: Three Paradigms and Ambivalent Policies' *Oxford Journals* 484–518.
Lewis, J (1992), 'Gender and the Development of Welfare Regimes' *Journal of European Social Policy* **2**(3) 159–173.
Lewis, J (ed) (1993), *Women and Social Policies in Europe*, Camberley: Edward Elgar.
Lewis, J (2006), 'Work/family Reconciliation, Equal Opportunities and Social Policies: The Interpretation of Policy Trajectories at the EU Level and the Meaning of Gender Equality' *Journal of European Public Policy* **13**(3) 420–437.
Liff, S and J Wajcman (1966), '"Sameness" and "Difference" Revisited: Which Way Forward For Equal Opportunity Initiatives?' *Journal of Management Studies* 33.
McGlynn, C (2000), 'Ideologies of Motherhood in European Community Sex Equality Law' *European Law Journal* **6**(1) 29–44.
McGlynn, C (2001), 'European Union Family Values: Ideologies of "Family" and "Motherhood" in European Union Law' (Fall) *Social Politics*.
Monster, WC (2001), 'Moederschapsideologie en het HvJEG: een reactie [The Ideology of Motherhood and the ECJ: A Reaction]', *Nemesis* 47–53.
More, GC (1993), '"Equal Treatment" of the Sexes in European Community Law: What Does "Equal" Mean?' *Feminist Legal Studies* **1**.
Oakley, A (1974), *Women's Work: The Housewife Past and Present*, London: Pantheon Books.
Oakley, A (1985), *Sex, Gender and Society*, London: Temple Smith, Reprinted with new Introduction, London: Gower, 1985.
Orloff, AS (2010), 'Gender', in Castles, FG, S Leibfried, J Lewis, H Obinger, C Pierson (eds) (2010), *The Oxford Handbook of the Welfare State*, Oxford: Oxford University Press, 252–265.
Rees, T (1998), *Mainstreaming Equality in the European Union: Education, Training and Labour Market Policies*, London: Routledge.
Rhode, DL (1992), 'The Politics of Paradigms: Gender Difference and Gender Disadvantage', in Bock, G and S James (eds) (1992), *Beyond Equality and Difference, Citizenship, Feminist Politics and Female Subjectivity*, London and New York: Routledge, 149–163.
Robila, M (2012, 'Family Policies in Eastern Europe: A Focus on Parental Leave' *Journal of Child Family Studies* **21** 32–41.
Rossili, M (ed) (2000), *Gender Policies in the European Union*, New York: Peter Lang Publishing Inc.
Sainsbury, D (ed) (1994), *Gendering Welfare States*, London: Sage.
Salido, O (2002), *Women's Labour Force Participation in Spain*, *working paper 02-15 Unidad de Politicas Comparads*, Madrid: CSIC.
Saxonberg, S (2013), 'From Defamilization to Degenderization: Toward a New Welfare State Typology' *Social Policy and Administration* **47**(1) 26–49.
Saxonberg, S and T Sirovátka (2006), 'Failing Family Policy in Post-Communist Central Europe' *Journal of Comparative Policy Analysis* **8**(2) 185–202.
Saxonberg, S and D Szelewa (2007), 'The Continuing Legacy of the Communist Legacy? The Development of Family Policies in Poland and the Czech Republic' *Social Politics* **14** 351–379.
Scott, J. (1989), 'Gender, a Useful Category of Historical Analysis', in Weed, E (ed), *Coming to Terms*, London: Routledge 81–100.
Sinzheimer, H (1927), 'Das Wesen der Arbeitsrecht', in H Sinzheimer, *Arbeitsrecht und Rechtsoziologie*, Vol 1, Cologne: Bund Verlag.
Sinzheimer, H (1927), *Arbeitsrecht und Rechtsoziologie*, Vol 1, Cologne: Bund Verlag.
Sohrab, JA (2000), 'European Equality Legislation on Social Security', in M Rossili (ed), *Gender Policies in the European Union*, New York: Peter Lang Publishing Inc. 107–123.
Sullerot, E (1968), *Histoire et sociologie du travail féminin*, Paris: Editions Gonthier.
Sullerot, E *L'emploi des femmes et ses problèmes dans les états membres de la Communauté Européenne*, Brussels: European Commission.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

Trifiletti, R (1999), 'Southern European Welfare Regimes and the Worsening Position of Women', *Journal of European Social Policy* **9**(1) 49–64.
Vonk, G (2014), 'Repressive Welfare States: The Spiral of Obligations and Sanctions in Social Security' *EJSS* **3** 188–203.
Weed, E (ed) (1989), *Coming to Terms*, London: Routledge.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:00:59PM
via University College London (UCL)

12. Social security and the disabled

Elisabeth Kohlbacher

I. INTRODUCTION

At international, European and national level, there are covenants, directives and other legal provisions prohibiting discrimination against disabled people. Within the EU and its Member States, there is no specific social security scheme referring to disabled people. On the contrary, disability policy has for a long time been part of other policy areas such as health insurance, poverty-avoidance schemes, welfare services or invalidity pension schemes and still is a compilation of numerous programmes, strategies and isolated legal regulatory measures. With regard to social inclusion of all people, regardless of their capacities, current aims particularly are to prohibit discrimination against disabled people and to promote their participation in the labour market. Promoting economic self-sufficiency is one of the main measures to prevent disabled people from having to live in poverty and thus to dismantle the poverty trap. Yet, in economically difficult times such as those we are currently experiencing, it is difficult for disabled people to find employment or not to drop out of the labour market. In order to promote employment, policy makers tend to diminish social protection for disadvantaged groups such as disabled people. By taking a look at the relevant international and European legal provisions, some data, the situation in one EU Member State – Austria – and by examining a recent Court of Justice judgment on that topic, the following chapter will show that there is a connection between employment policy, anti-discrimination policy and other EU policy measures concerning disabled people. Furthermore, it highlights the complexity of balancing the reduction of unemployment rates against the protection of socially disadvantaged groups. Particular focus is put on the aim of enhancing economic efficiency and avoiding economic costs for the social welfare state and the social security risk community on the one hand, and on closing the benefit as well as the poverty trap on the other, by enabling disabled people to participate in the regular labour market.

II. DEFINITION OF DISABILITY

There is no generally acknowledged definition of disability but rather a variety of models and concepts for determining that a person is disabled. Thus, various documents offer different definitions. There are two main concepts of how to explain 'disability' – the medical model and the social model.[1]

[1] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 19.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

According to the medical model, 'disability' is defined as a person's individual and personal quality, deriving from or caused by an illness, a trauma or any other health problem. Thus, only the definite medical diagnosis is relevant when deciding if a person is disabled and therefore in need of medical care, regardless of whether the person feels disabled or not.[2]

The social model, on the other hand, classifies 'disability' as a problem caused by society. Disability is defined as the situation of an impaired person in his or her environment and is therefore a social and cultural construct. Compared to the medical model, dealing with disability according to the social model does not imply only medical treatment, but taking responsibility for creating an inclusive environment so that disabled people can participate in social life.[3]

In the 54th World Health Assembly on 22 May 2001 (resolution WHA 54.21), the WHO released the 'International Classification of Functioning, Disability and Health (ICF)': ICF was officially endorsed by all 191 WHO Member States as the international standard to describe and measure health and disability.[4] The ICF definition of disability is built according to a 'biopsychosocial' model, i.e. one that is based on a combination of the medical and the social model. Disability therefore comprises all medical impairments, restrictions in activities and restrictions in participation, i.e. that disability can be defined as the result or the consequence of health-related problems of a person and in the context of his/her material and social environment.[5]

This combination of the medical and social model is also the basis of the definition of disability according to the UN Convention on the Rights of Persons with Disabilities (hereafter 'the UN Convention'). At EU level, there is no specific definition of disability.[6] However, since the mid-1990s, also at EU level the social model is the prevailing model regarding the definition of disability. In 1996, the Commission acknowledged that emphasis has to be put on 'identifying and removing the various barriers to equal opportunities and full participation in all aspects of life'. According to the Commission, 'changes in the way we organise our societies can substantially reduce or even overcome obstacles found by people with disability'. Integration is 'the key to inclusion in active society'.[7] In the European Action Plan 2008–2009[8] the Commission further acknowledges that 'disabled people continue to be disproportionately excluded from the labour market'. The economic dimension of the non-participation of disabled people in the labour market is 'growing', particularly from the perspective of equal opportunities. In concrete terms, 'accessibility can make the difference between a disabled person being active in the labour market and being

---

[2] Deutsches Institut für medizinische Dokumentation und Information, *Internationale Klassifikation der Funktionsfähigkeit, Behinderung und Gesundheit* (Deutsches Institut für medizinische Dokumentation und Information 2005) 24.

[3] *Ibid*.

[4] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 21.

[5] *Ibid*.

[6] *Ibid* 25.

[7] European Commission, *Equality of Opportunity for People with Disabilities – A New European Community Disability Strategy* [1996] COM 406 final 3.

[8] European Commission, *Situation of Disabled People in the European Union: The European Action Plan 2008–2009* [2007] COM 738 final.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

dependent on social welfare'. This is also acknowledged by the Court of Justice of the European Union: with regard to Article 1 Directive 2000/78/EC,[9] according to which it is the Directive's purpose 'to lay down a general framework for combating discrimination on the grounds of disability as regards employment and occupation, the concept of *disability* – for the purpose of the Directive – must be given an autonomous and uniform interpretation'.[10] Regarding anti-discrimination according to the Directive, the concept of 'disability' must be understood as 'referring to a limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.[11] In addition, in order for the limitation to fall within the concept of 'disability', it must be 'probable that it will last for a long time'.[12] The Court of Justice's definition therefore definitely contains elements of the social model, although the physical, mental or psychological impairment is indispensable.[13]

In *Ring/Werge*, the Court of Justice clarified that

> the concept of disability in the Directive must be interpreted as including a condition caused by an illness medically diagnosed as curable or incurable where that illness entails a limitation which results in particular from physical, mental or psychological impairments which, in interaction with various *barriers* may hinder the full and effective participation of the person concerned in professional life on an equal basis with other workers, and the limitation is a long-term one.[14]

In other words, the Court of Justice now explicitly differentiates between the cause of a disability, which may be an illness medically diagnosed as curable or incurable, and the disability itself as a long-term limitation resulting particularly from physical, mental or psychological impairments and which – and this is the point where the social model comes to the fore – may hinder the full and effective participation of the person concerned in the labour market on an equal basis with other workers.[15] In this way, the Court of Justice also takes full account of the definition of disability in the UN Convention.

At EU level, the term 'disability' thus definitely not only follows the medical model but has a strong social connotation.[16] When talking about disability and EU policies, that strong social connotation, which focuses especially on inclusion and participation of disabled people, has to be taken into account.

---

[9] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation [2000] OJ L303 16–22.

[10] Case C-13/05 *Chacón Navas* [2006] ECR I-6467.

[11] *Ibid* [43].

[12] *Ibid* [45].

[13] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 38.

[14] Case C-335/11 *Ring/Werge* nyr [47]. See also Case C-354/13 *Kaltoft*, where the Court of Justice held that obesity can be covered by the concept of disability within the meaning of Directive 2007/78, as developed in the *Ring/Werge* judgment.

[15] Michaela Windisch-Graetz, 'Begriff der Behinderung und zumutbare Maßnahmen' [2014] *DRdA* 34.

[16] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 25.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

III. DISABILITY POLICY AS PART OF WELFARE STATE POLICY

One of the main aims of modern welfare states is to guarantee participation in society for people who cannot contribute as much to the GDP as others. However, the social welfare state also focuses on developing and restoring human capital within the group of these people in order to enhance their possibilities to actively contribute to the labour market. The aims of modern welfare states thus are not only minimising poverty, enhancing equality, supporting integration and avoiding exclusion, but also enhancing economic efficiency.[17] One target group are persons with a disability, as their lower rate of employment seems to be largely responsible for the higher rate of poverty compared to people without impairment.[18] The welfare state model defines those people generally as persons with diminished productivity and therefore only restricted ability to actively participate in the labour market. In order to support these people and especially to diminish the risk of poverty, social security schemes were established, e.g. unemployment insurance, care allowance systems or old age pension systems.[19] In 2005, approximately 26 million working age individuals were granted disability benefits throughout the EU, i.e. 5 per cent of the employed labour force.[20]

Yet, disability policy's aim is not only to improve the situations of persons with disabilities, but also to avoid economic costs and to maintain employment possibilities. Disability policy thus focuses on the one hand on disabled people themselves, and on the other hand on their environment and how to keep its costs at a low basis.[21] Disability policy is nowadays particularly aimed at establishing equality and participation, whereas in the past decades, first compensation mechanisms and then rehabilitation mechanisms, where disabled people were only compensated for their deficiencies and were offered job opportunities outside the regular labour market, respectively, were favoured.[22] According to a 2003 OECD report, disability policy has two goals: on the one hand, it is aimed at minimising exclusion by enabling as many disabled people as possible to participate in the labour market, on the other hand its aim is to guarantee income protection in order to prevent a too high loss of standard of living in case of

---

[17] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften, 2008) 50; with reference to Goodin et al, *The Real Worlds of Welfare Capitalism* (Cambridge University Press, 2000).

[18] See e.g. the tables concerning the relation between disability and poverty in Christopher Heady, 'Sickness and Disability', in Matt Barnes et al (eds), *Poverty and Social Exclusion in Europe* (Edward Elgar Publishing 2002) 101 (115).

[19] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 50.

[20] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/ Springer 2012) 127 (140).

[21] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 51 f.

[22] *Ibid* 52 ff.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

inability to work.[23] Promoting economic self-sufficiency is also regarded as one of the main aims to prevent disabled people from having to live in poverty and thus to dismantle the poverty trap.[24]

Within the EU and its Member States, there is no specific social security scheme referring to disabled people. On the contrary, disability policy has for a long time been part of other policy areas such as health insurance, poverty-avoidance schemes, welfare services or invalidity pension schemes.[25] Only in the 1980s were these welfare schemes completed with specific rehabilitation measures and measures aiming at special protection for disabled people at work. In the 1990s, as policy makers started realising that disability also had effects on the environment of persons with a disability, anti-discrimination policy entered the field of disability policy, with the aim of guaranteeing equality and inclusion. Nevertheless, disability policy is still a compilation of numerous programmes, strategies and isolated legal regulatory measures, as we will see in the following sections of this chapter. Thus, the following quotation of Berkowitz is still valid for the EU and its Member States:[26]

> Disability does not represent an exception to the general pattern of anachronistic and uncoordinated programs that are resistant to change. … In disability, as in social welfare in general, the only avenue to fundamental reform is to add another Program to existing programs and to cope with the resulting confusion.[27]

The Commission itself has identified 'insufficient coherence of the approach concerning disability strategies across the EU'. It concedes that 'good practices in various Member States deserve recognition'. 'The Open Method of Coordination in the area of Social Protection and Social Inclusion and in the area of Employment as it is operating presently, however, does not seem to allow for addressing more specific issues important to persons with disabilities.' In order to complement the mainstreaming, targeted measures are missing.[28]

As a result, disability policy measures comprise various fields. With regard to the working population (people between 15/20 and 65 years), the following measures form part of disability policy:

---

[23] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/Springer 2012) 127 (128).

[24] D Stapleton, B O'Day, G Livermore and A Imparato, 'Dismantling the Poverty Trap: Disability Policy for the Twenty-first Century' (2006) 84(4) *The Milbank Quarterly* 701–732.

[25] Statistics in Austria show that in 2008, 446,676 people with a disability were entitled to invalidity pensions <www.oear.or.at/barrierefrei-gestalten/barrierefreie-kommunikation/zahlen-und-fakten/menschen-mit-behinderungen-in-osterreich-zahlen-und-fakten/, accessed 17 April 2014.

[26] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 54 f.

[27] Edward D Berkowitz, *Disabled Policy: America's Programs for the Handicapped* (Cambridge University Press 1987) 227.

[28] European Commission, *Roadmap EU Disability Strategy 2010–2020* (DG EMPL/G/3, 2010) 3 <http://ec.europa.eu/smart-regulation/impact/planned_ia/docs/139_2_empl_disability_strategy_en.pdf> accessed 17 April 2014.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

- quota systems;
- specific protection measures at work (including special protection in case of termination of the employment contract);
- work place assistance;
- general and specific (re-)employment programmes;
- income subsidies;
- vocational rehabilitation, qualification, training;
- improvement of reasonable accommodation, with special focus on eliminating barriers;
- household-assistance.

Once disabled people are not able to perform any work any more, they are taken care of by the old age pension system, care allowance measures and invalidity pension systems.[29] Several studies have recently shown that there is a strong connection between low unemployment rates and high rates of disability. In the Netherlands, where there exists disability insurance, research shows that about one-quarter of disability insurance enrolments constitute hidden unemployment.[30]

The apparent inhomogeneity in the measures taken to enhance equality of disabled people and their participation in society derives from the heterogeneity of the group of disabled people itself: not every person with a disability is impaired in terms of work capacity, nor every disabled person in need of social assistance,[31] to name but some of the divergences. Disability takes several forms and varies considerably in terms of its severity.[32] Thus, there is also a variety of ways in which social welfare states deal with enabling disabled people and taking care of this heterogeneous group.[33]

At EU level, there is also a policy mix[34] with regard to disabled people. In the following, several EU policy measures, especially anti-discrimination legislation and specific measures to promote employment of disabled people are analysed with the aim of pointing out the connection between these measures and the overall aim of enhancing economic efficiency and avoiding economic costs for the social welfare state and the social security risk community in general. As the Union's disability policy is strongly influenced by international standards, two important documents, the UN

---

[29] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 55.

[30] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/Springer 2012) 127, 141, with reference to PWC Koning and DJ van Vuuren, 'Disability Insurance and Unemployment Insurance as Substitute Pathways' (2010) 42(5) *Appl Econ* 575–588.

[31] As can be seen in the recent judgment of the Court of Justice in Case C-354/13 *Karsten Kaltoft* nyr.

[32] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/Springer 2012) 127, 128.

[33] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 56.

[34] *Ibid* 67 ff.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

Convention and the Council of Europe's Revised European Social Charter will be analysed first.

IV. SPECIAL PROTECTION AND PUBLIC INTERNATIONAL LAW

At non-EU level, two important documents providing for special protection for disabled people are the UN Convention, adopted in 2006, at international level, and the Revised European Social Charter at 'European'[35] level. These documents influence the Union's and the Member States' position regarding special protection of disabled people, although they are neither part of primary nor of secondary Union law.

IV.i UN Convention on the Rights of Persons with Disabilities

The UN Convention is the first legally binding international human rights instrument to which the European Union and its Member States are parties.[36] Until now, 141 states have ratified the UN Convention, among those states – apart from the Netherlands, Ireland and Finland – all EU Member States as well as the EU itself.[37] According to Article 216 para 2 TFEU, agreements concluded by the Union are binding upon the institutions of the Union and on its Member States. Furthermore, the Court of Justice held that the primacy of international agreements concluded by the European Union over provisions of secondary Community legislation means that such provisions must, so far as is possible, be interpreted in a manner that is consistent with those agreements.[38] Thus, the content of the UN Convention is of the utmost importance when determining the content of secondary EU legislation.[39]

According to Article 1 of the UN Convention '(p)ersons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'. The purpose of the UN Convention is to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity'. With regard to the labour market, the UN Convention establishes that the States Parties should 'promote (the) recognition of the skills, merits and abilities of persons with disabilities, and of their contributions to the workplace and the labour market' (Article 8.2.a.iii). Article 27 explicitly addresses the situation of disabled people and the labour market. The UN Convention promotes affirmative action and

---

[35] See Matti Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 61, who points out that the Revised European Social Charter is a 'typical international legal instrument'.

[36] European Commission, *European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe* [2010] COM 636 final.

[37] European Council, *Conclusion, by the European Community, of the United Nations Convention on the Rights of Persons with Disabilities* [2010] OJ L23, 35–36.

[38] Cases C-320/11, C-330/11, C-382/11, C-383/11 *Digitalnet and others* nyr.

[39] Hans Georg Laimer and Lukas Wieser, 'EuGH: Anpassung des Behinderungsbegriffs und Teilzeitarbeit als verhältnismäßige Vorkehrungsmaßnahme' [2013] *RdW* 398, 399.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

incentive programmes with particular focus on the promotion of employment opportunities in the general labour market, also by ensuring reasonable accommodation. States Parties to the UN Convention, which means also the European Union, must submit to the Committee a comprehensive report on measures taken to give effect to its obligations under the UN Convention and on the progress made in that regard, within two years after the entry into force of the UN Convention for the State Party concerned. Thereafter, States Parties shall submit subsequent reports at least every four years and further whenever the Committee so requests (Article 35 of the UN Convention).

IV.ii Revised European Social Charter

In comparison to the old European Social Charter, adopted in 1961, the Revised European Social Charter (1996) is based on new policy principles and especially puts focus on the principle of inclusion. According to its Article 30, measures shall be taken to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as of their families, to, in particular, employment, housing, training, education, culture and social and medical assistance. The Revised European Social Charter therefore prioritises mainstream measures as well as the promotion of equal opportunities and social inclusion.[40]

Article 15 Revised European Social Charter secures the rights of persons with disabilities, together with the Revised European Social Charter's provisions on the prohibition of discrimination (Article E). The principles of independence, social integration and participation in the life of the community are explicitly addressed and promoted by Article 15 Revised European Social Charter. The Parties therefore undertake, regarding education and employment,[41] in particular,

1. to take the necessary measures to provide persons with disabilities with guidance, education and vocational training in the framework of general schemes wherever possible or, where this is not possible, through specialised bodies, public or private;
2. to promote their access to employment through all measures tending to encourage employers to hire and keep in employment persons with disabilities in the ordinary working environment and to adjust the working conditions to the needs of the disabled or, where this is not possible by reason of the disability, by arranging for or creating sheltered employment according to the level of disability. In certain cases, such measures may require recourse to specialised placement and support services.

The European Committee of Social Rights (ECSR) has therefore held in its case law that in order to promote disabled persons' access to the open labour market and to arrange working conditions accommodating their needs, legislation shall e.g. prohibit discrimination on the basis of disability in employment, including discrimination regarding dismissal. With regard to the requirement of reasonable accommodation,

[40] Matti Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 15, 553.
[41] Paragraph 3 focuses on participation in the life of the community.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

employers are not only obliged to ensure effective access to employment, but also to keep disabled people in employment.[42]

Although the European Union itself is not party to the Revised European Social Charter, the Charter is of importance when determining the level of protection at EU level. According to Article 151 TFEU, when acting in the field of Social Policy, the Union and the Member States bear in mind fundamental social rights such as those set out in the European Social Charter. Furthermore, the Preamble of the Charter of Fundamental Rights of the EU (CFR) states that:

> [T]he Charter of Fundamental Rights reaffirms, with due regard for the powers and tasks of the Union and for the principle of subsidiarity, the rights as they result, in particular, from the … international obligations common to the Member States, … the Social Charters adopted by the Union and by the Council of Europe … .

In addition, regarding the level of protection granted by the CFR, according to Article 53 CFR '(n)othing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party …'. As all 28 Member States of the EU are party to the Revised European Social Charter, this Charter's provisions, and thus also its provisions regarding the protection and social inclusion of disabled people, form the minimum standard to be guaranteed by the CFR.[43] The Explanations[44] to Article 26 CFR explicitly state that the Principle set out in this Article is based on Article 15 Revised European Social Charter. Thus, as the Explanations 'shall be given due regard by the courts of the Union and of the Member States' according to Article 52 para 7 CFR, the Principle set out in Article 26 CFR should be interpreted as having the same content as Article 15 Revised European Social Charter.[45]

V. DISABLED PEOPLE AND EUROPEAN UNION LAW

The following section deals with primary and secondary EU law provisions which particularly focus on anti-discrimination of disabled people on the one hand and on promotion of employment of persons with a disability on the other. First, though, by referring to available statistic data first, the situation of disabled people regarding the labour market within the EU is displayed.

---

[42] Matti Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 558 f, with references to the ECSR's Conclusions.

[43] *Ibid* 95.

[44] 2007/C 303/02.

[45] Cf Matti Mikkola, *Social Human Rights of Europe* (Karelactio 2010) 104.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

V.i Statistics

According to the Communication from the Commission, *the European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe in 2010*[46] (hereafter 'the Disability Strategy'), one in six people in the EU has a disability that ranges from mild to severe making around 80 million who are often prevented from taking part fully in society and the economy. However, having a long-standing health problem or disability does not necessarily imply difficulties in working or undertaking normal activities – in 2002, 33% of those disabled who took part in the European Union Labour Force Survey on Employment of Disabled People (hereafter '2002 survey')[47] reported that they were not restricted in the kind or amount of work they could do or their mobility to and from work.[48]

In general, the likelihood of being restricted in the ability to work as a result of a long-standing health problem or disability increases markedly with age. Whereas under 4% of young people in the EU aged 16–24 reported being restricted in their ability to work in some way – and only just under 2% reported being considerably restricted – this was the case for 9% of people aged 25–54, with just over 5% being considerably restricted, and 21% of those aged 55–64, with around 14% being considerably restricted.[49]

Those who conducted the 2002 survey also wanted to know the percentage distribution of types of assistance provided to disabled people in employment. EU-wide, 36.3% received assistance with kind of work, 17.4% assistance with amount of work, 4.9% assistance with mobility to get to and from work, 2.1% assistance with mobility at work and 19.5% support and understanding by superiors and colleagues.[50]

Educational attainment levels also have a major effect on the relative employment rates of men and women irrespective of whether they are restricted or not. Since education levels are lower among the restricted than the non-restricted, it is important to take this explicitly into account when comparing employment rates. The following figures show the direct impact of the level of education on the unemployment rate also for disabled people: Of those with higher (tertiary) education in the EU, 48% of those who were *considerably restricted* were in employment compared with only 20% of those with only basic schooling.

The 2002 survey also showed that the average income of those people with limitations tends to be lower than of those without limitations.[51] Furthermore, social transfer benefits have a significant effect in raising the income of *those with limitations*

---

[46] European Commission, *European Disability Strategy 2010–2020: A Renewed Commitment to a Barrier-Free Europe* [2010] COM 636 final.

[47] <http://epp.eurostat.ec.europa.eu/portal/page/portal/product_details/publication?p_product_code=KS-NK-03-026> accessed 21 February 2014.

[48] See again the recent judgment of the Court of Justice in Case C-354/13 *Karsten Kaltoft* nyr, which shows that although a disabled person is not restricted in his/her working capacities, protection against discrimination might be necessary.

[49] 2002 survey 41.

[50] <http://appsso.eurostat.ec.europa.eu/nui/show.do?dataset=hlth_db_emaspt&lang=en> accessed 21 February 2014.

[51] 2002 survey 17.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

relative to *those without limitations.* The average income of people who were *strongly limited* was almost 44% less than the incomes of those *not limited* before taking account of benefits received (which, in this calculation, include all benefits paid whether for disability or not), the equivalent figure for those *limited to a smaller extent* being 23%. Social benefits therefore raise the income of people with limitations in relation to the income of those *not limited* by around 60%.[52] However, in the Roadmap to the Disability Strategy, the so-called 'benefit trap' is identified as a significant obstacle for labour market participation of persons with disabilities:[53] Often, ability to work means loss of income subsidies.[54]

Suffering from an illness or disability which restricts the kind or amount of work a person can do or mobility to and from work not only markedly reduces the likelihood of being employed – as described above – it also increases the probability of someone actively looking for work not being able to find a job and, therefore, of being unemployed. In 2002, employment rates for persons with very severe and severe degrees of disability were 19.5% and 44.1% respectively and the incidence of poverty for persons with disabilities was 70% higher than average[55] – thus 'due to lower employment rates and a higher dependency on social transfers, persons with disabilities are more often at risk of poverty'.[56]

The low employment rates among those who are restricted, therefore, cannot simply be explained by the people concerned not wanting to work. However, at the same time participation rates are also lower among the restricted than among those who are not restricted, which may signify that a relatively large number of the people in question are incapable of working, or it may mean that they are deterred from actively looking for employment by the difficulties related to that process and are therefore counted as being economically inactive rather than unemployed.

In addition to the low employment rates, unemployment rates of disabled people tend to be significantly higher than the unemployment rates of not restricted persons, resulting in a high percentage of disabled people not in employment. The unemployment rate among people who were considerably restricted was around 16% in 2002 in the EU Member States. This compares with a rate of 7.5% for those not restricted,

---

[52] 2002 survey 18.

[53] European Commission, *Roadmap EU Disability Strategy 2010–2020* (DG EMPL 2010).

[54] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 170.

[55] *Roadmap EU Disability Strategy 2010–2020*, DG EMPL/G/3, 2, see note 53.

[56] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief European Centre for Social Welfare Policy and Research (Vienna 2014) <www.euro.centre.org/data/1393943316_63424.pdf> accessed 17 April 2014, with reference to A Brennan and Pauline Conroy, 'The three per cent target for the employment of people with disabilities in the public service' (2009) National Disability Authority Paper 12, Dublin, 12; EU-SILC (2009), Secondary analysis by Asghar Zaidi/European Centre of the micro-data provided by Eurostat; Bent Greve, 'The labour market situation of disabled people in European countries and implementation of employment policies: a summary of evidence from country reports and research studies' (2009) Report prepared for the Academic Network of European Disability experts (ANED), Leeds April 2009, 15; OECD, *Sickness, Disability and Work: Breaking the Barriers* (OECD 2010) 10.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

under half the rate, therefore, of the considerably restricted.[57] In December 2013, the unemployment rate in general in the EU was as high as 10.7%.[58]

V.ii Competences

Disability is a cross-cutting matter with a very wide scope, thus it is related to most of the EU policies.[59] However, the distribution of competences between the EU and the Member States leads to the fact that with regard to disability policies, the EU is only competent to create secondary and therefore binding law in the field of anti-discrimination – combating discrimination is under shared competences. With regard to e.g. education and vocational training, the competences of the EU are limited: many areas crucial to everyday life of persons with disabilities, such as content and structure of education, the norms for built environment and public spaces as well as social assistance, are almost exclusively in the competence of the Member States. Yet, as employment and social protection/social inclusion are areas where EU action only complements the measures taken by the Member States it may be justified on grounds of subsidiarity (Articles 5 TEU, 147 TFEU, 153 TFEU).[60] According to Article 153(1)(h) and (j), the EU shall support and complement the activities of the Member States in the field of the integration of persons excluded from the labour market, without prejudice to Article 166 (Article 153(1)(h)) and in the field of the combating of social exclusion (Article 153(1)(j)). The European Parliament and the Council may therefore (a) adopt measures designed to encourage cooperation between Member States through initiatives aimed at improving knowledge, developing exchanges of information and best practices, promoting innovative approaches and evaluating experiences, excluding any harmonisation of the laws and regulations of the Member States; and in the field of lit h may, according to Article 153(1)(b) adopt, by means of directives, minimum requirements for gradual implementation, having regard to the conditions and technical rules obtaining in each of the Member States. Such directives shall avoid imposing administrative, financial and legal constraints in a way which would hold back the creation and development of small and medium-sized undertakings.

However, apart from Directive 2000/78/EC which also regulates the non-discrimination of disabled people, there has been no specific legislative activity in the field of disability at secondary EU law level. With regard to the concretisation of social security schemes, harmonisation is even more difficult than in the field of labour law, as there is enormous heterogeneity among the national social security schemes.[61] Therefore, there is also no specific reference to benefits provided to disabled persons in the Social Security Coordination Regulation 883/2004. Disability benefits thus only fall under the scope of this Regulation if they are categorized as one of the benefits listed in Article

---

[57] 2002 survey 104.

[58] Data from eurostat: http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&plugin=1&language=de&pcode=teilm020, accessed 21 February 2014.

[59] *Roadmap EU Disability Strategy 2010–2020*, DG EMPL/G/3, 2, see note 53.

[60] *Ibid*.

[61] Robert Rebhahn and Michael Reiner, 'Article 153 TFEU', in Jürgen Schwarze (ed), *EU-Kommentar* (3rd edition) (Helbing & Lichtenhahn 2013) para 45.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

3. Yet, there are provisions referring to protection of disabled people, namely with regard to health and safety at work, based on Article 153(1)(a) TFEU or its previous articles, respectively. According to Directive 89/654/EC[62] and its Annexes, '(w)orkplaces must be organized to take account of handicapped workers, if necessary. This provision applies in particular to the doors, passageways, staircases, showers, washbasins, lavatories and workstations used or occupied directly by handicapped persons' (Annex I.20; Annex II.15).

There might also be legislation regarding social security and social protection of workers according to Article 153(1)(c) TFEU, yet para 4 provides that this provision shall not affect the right of Member States to define the fundamental principles of their social security systems and must not significantly affect the financial equilibrium thereof. Thus, the financing of the national social security schemes and therefore also the specific benefits remain in the competence of the Member States.[63]

Furthermore, it is unresolved whether disabled people who are excluded from the labour market might fall under the scope of a measure according to Article 153(1)(h) TFEU. Rebhahn and Reiner name specific provisions such as more flexible criteria concerning definite employment contracts as an example of facilitating integration into the labour market. Thus, also provisions providing e.g. shorter notice periods for groups of people excluded from the labour market may be the subject of measures under the title of integration of persons excluded from the labour market. It is controversial whether such measures can also apply to people already in employment – the wording of Article 153(1)(h) TFEU explicitly only takes into account 'persons excluded from the labour market', whereas with regard to the aim and systematic of Article 153 TFEU, one would rather argue for including people already in employment.[64]

The competence to combat social exclusion according to Article 153(1)(j) TFEU only comprises the power to organise cooperation between the Member States. This competence was introduced in the framework of the Lisbon Strategy and aims at combating poverty and social exclusion. Despite the missing legislative competence of the Union, the Open Method of Coordination is fairly successfully applied in this field of politics.[65] Programmes such as the 'programme of Community action to encourage cooperation between Member States to combat social exclusion' are based on this competence.[66]

---

[62] Council Directive 89/654/EEC of 30 November 1989 concerning the minimum safety and health requirements for the workplace (first individual directive within the meaning of Article 16 (1) of Directive 89/391/EEC), [1989] OJ L393 1–12.

[63] Robert Rebhahn and Michael Reiner, 'Article 151 TFEU', in Jürgen Schwarze (ed), *EU-Kommentar* (3rd edition) (Helbing & Lichtenhahn 2013) para 33.

[64] *Ibid* para 55.

[65] Gerhard Hesse, 'Article 153 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) para 28; see also Beryl ter Haar, *Open Method of Coordination. An Analysis of its Meaning for the Development of a Social Europe* (Leiden University Press 2012).

[66] Decision No 50/2002/EC of the European Parliament and of the Council of 7 December 2001 establishing a programme of Community action to encourage cooperation between Member States to combat social exclusion, OJ L10/2002; Robert Rebhahn and Michael Reiner, 'Article 153 TFEU', in Jürgen Schwarze (ed), *EU-Kommentar* (Helbing & Lichtenhahn 2013) para 61.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

With regard to social protection, the Disability Strategy e.g. concedes that it will 'support national measures to ensure the quality and sustainability of social protection systems for people with disabilities, notably through policy exchange and mutual learning in full respect of the competence of the Member States'.[67] Thus, most of the compensation-related schemes of disability policies, e.g. invalidity pensions or care allowance schemes, are not influenced by EU legislation, unless the social security benefits fall into the scope of mechanisms concerning the protection and promotion of migrant workers.[68] As the EU is competent to act in issues related to the Single Market according to Article 114 TFEU, 'actions at EU level can be justified when the aim is to achieve a common basic level of protection across Member States, increase mobility of Europeans with disabilities in Europe or to increase the level playing field and to enlarge markets'.[69]

By implementing strategies and by means of the European Social Fund, the EU may therefore – despite its restricted competences – play an important role in promoting employment of disabled people, especially by supporting and complementing national and local initiatives.[70] Furthermore, actions at EU level can aim at coordinating and monitoring actions on Member State and other government sub-levels.[71] The Disability Strategy itself underlines that it requires a joint and renewed commitment of the EU institutions and all Member States.[72] Moreover, even in the Roadmap to the Disability Strategy, the Commission conceded that exhausting the full extent of EU competences could have undesirable impacts such as overregulation, lack of flexibility and excessive burden of compliance.[73] On the contrary, by focusing on complementing Member States' activities and on reinforcing cooperation among the Member States, disability policy action remains flexible and respects the traditions of the Member States.[74]

V.iii Primary EU Law

According to Article 3 TEU:

> [T]he Union shall establish an internal market. It shall work for the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment. … It shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child.

---

67 [2010] COM 636 final 8.

68 E.g. Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 143.

69 *Roadmap EU Disability Strategy 2010–2020*, DG EMPL/G/3, 4, see note 53.

70 *Ibid* 2.

71 *Ibid*.

72 [2010] COM 636 final 9.

73 *Roadmap EU Disability Strategy 2010–2020*, DG EMPL/G/3, 8, see note 53.

74 *Ibid* 9.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

The TFEU requires the Union to combat discrimination based on disability when defining and implementing its policies and activities (Article 10) and gives it the power to adopt legislation to address such discrimination (Article 19).

Article 10 TFEU concretises the European Union's aims listed in Article 3 TEU and qualifies as provision with 'mainstreaming' character, i.e. that combating discrimination based on disability is a 'mainstreaming' task. Although the aim of combating discrimination cannot be defined as 'not legally binding', Article 10 TFEU does not grant any directly applicable individual rights.[75] Furthermore, Article 10 TFEU does not extend the Union's competences. On the contrary, together with Article 19,[76] it is the basis for legislation within the powers of competence of the EU according to Articles 2 ff TFEU.[77] With regard to the Member States, Article 10 TFEU does not create any direct obligation. However, in accordance with Article 4 para 3 sub-para 3, the Member States must not undermine any of the Union's aims at the national level.[78]

Article 19 TFEU is aimed at combating not only formal, but also actual discrimination on the grounds of disability. It shall guarantee concrete rights and effectively combat discrimination by taking advantage of all measures provided for by Article 288 TFEU.[79] On the basis of Article 19 TFEU (ex Article 13 EC), the Directive 2000/78/EC was adopted. Also based on Article 19 TFEU, the 'Community Programme for Employment and Social Solidarity – Progress'[80] was adopted, aimed at financially supporting the implementation of the objectives of the European Union in the fields of employment and social affairs, as set out in the Commission Communication on the Social Agenda, and thereby contributing to the achievement of the Lisbon Strategy goals in those fields (Article 1). From 2007 to 2013, the Programme was subsidised with a net sum of EUR 683 million, increased by a further EUR 250,000 in 2010. A Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,[81] other than in the field of employment and occupation, based on Article 19 TFEU, was proposed in 2008, yet it has not been adopted until now.

Since the Lisbon Treaty entered into force in December 2009, according to Article 6 TEU, also the CFR is part of EU primary law. Article 1 CFR states that 'Human dignity is inviolable. It must be respected and protected.' Article 26 CFR states that 'the EU

---

[75] N Oswald, 'Article 10 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) paras 1, 3.

[76] Anna Sporrer, 'Article 19 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) para 9.

[77] N Oswald, 'Article 10 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) para 4.

[78] N Oswald, 'Article 10 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) para 19.

[79] Anna Sporrer, 'Article 19 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) paras 12 f.

[80] Decision No 1672/2006/EC of the European Parliament and of the Council of 24 October 2006 establishing a Community Programme for Employment and Social Solidarity – Progress [2006] OJ L315, amended by Decision No 284/2010/EU of the European Parliament and of the Council of 25 March 2010 [2011] OJ L87, 6.

[81] COM(2008) 426 final.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community'. In addition, Article 21 prohibits any discrimination on the basis of disability.[82]

Article 26 CFR is a principle and not a fundamental right and completes Article 21 CFR.[83] However Article 26's function is not restricted to being a completion of Article 21 CFR, but has its own content.[84] Article 26 CFR does not grant any rights but presupposes that there are already rights and benefits, especially granted by the Member States. Article 26 CFR obliges the Union as well as the Member States (when implementing EU law according to Article 51 para 1 CFR[85]) to respect existing rights of persons with disabilities. Article 52 para 5 CFR provides that the EU may – within its competences – actively support disabled people, although the CFR does not provide for any obligation of support.[86]

V.iv Secondary EU Law

In 1999, the European Council at Helsinki agreed on 'Employment Guidelines for 2000'. These Guidelines stress the need to foster a labour market favourable to social integration by formulating a coherent set of policies aimed at combating discrimination against groups such as persons with a disability. In 2000, the most important EU document regarding non-discrimination of disabled people entered into force: Directive 2000/78/EC (hereafter 'the Directive'). Although the Directive's main aim regarding disabled people is to prevent discrimination, its goal goes beyond that: according to Recital 11 of the Directive, discrimination based on disability may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment. To this end, according to Recital 12, any direct or indirect discrimination based on disability as regards the areas covered by this Directive should be prohibited throughout the Community.

V.iv.a Prohibition of discrimination

According to Article 1, 'the purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of … disability … as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment'. Article 3 states that:

1. Within the limits of the areas of competence conferred on the Community, the Directive shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:

---

[82] See also COM(2010) 636 final.

[83] Friso Ross, 'Article 21 Charter of Fundamental Rights', in Jürgen Schwarze (ed), *EU-Kommentar* (Helbing and Lichtenhahn 2013) para 1.

[84] *Ibid* para 2.

[85] See e.g. Elisabeth Kohlbacher, *Streikrecht und Europarecht* (Linde Verlag 2014) 253 ff.

[86] Friso Ross, 'Article 21 Charter of Fundamental Rights', in Jürgen Schwarze (ed), *EU-Kommentar* (Helbing and Lichtenhahn 2013) para 3.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

(a) conditions for access to employment, to self-employment or to occupation, including selection criteria and recruitment conditions, whatever the branch of activity and at all levels of the professional hierarchy, including promotion;
(b) access to all types and to all levels of vocational guidance, vocational training, advanced vocational training and retraining, including practical work experience;
(c) employment and working conditions, including dismissals and pay;
(d) membership of, and involvement in, an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations.

Especially with regard to disabled persons, Article 7.2 states that the principle of equal treatment shall be without prejudice to the right of Member States to maintain or adopt provisions on the protection of health and safety at work or to measures aimed at creating or maintaining provisions or facilities for safeguarding or promoting their integration into the working environment. Thus, Member States can maintain national quota schemes, although – as we will see later – these schemes follow the concept of 'limitation of abilities' rather than promoting capabilities and therefore do not always coincide with anti-discrimination legislation.[87]

Yet, the Directive also concedes that disabled people cannot participate in every workplace: according to Recital 17, the Directive does not require the recruitment, promotion, maintenance in employment or training of an individual who is not competent, capable and available to perform the essential functions of the post concerned or to undergo the relevant training, without prejudice to the obligation to provide reasonable accommodation for people with disabilities. The Directive furthermore does not require, in particular, the armed forces and the police, prison or emergency services to recruit or maintain in employment persons who do not have the required capacity to carry out the range of functions that they may be called upon to perform with regard to the legitimate objective of preserving the operational capacity of those services (Recital 18). Moreover, in order that the Member States may continue to safeguard the combat effectiveness of their armed forces, they may choose not to apply the provisions of this Directive concerning disability and age to all or part of their armed forces. The Member States which make that choice must define the scope of that derogation (Recital 19).

The Directive therefore only requires Member States and employers to promote the employment of disabled persons still capable of performing certain minimum tasks. It is not the Directive's aim to keep disabled people who are not competent, capable and available to perform the essential functions of the post concerned in employment. Thus, an employer cannot be forced either to keep on people not capable of performing the essential functions in employment, i.e. he or she may also terminate the employment relationship without direct or indirect discrimination against the person with a disability. The employer may only be obliged to offer the employee an alternative position in the establishment/enterprise if the employee is able to perform the tasks

[87] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014) <www.euro.centre.org/data/1393943316_63424.pdf> accessed 17 April 2014.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

required for that other position. However, there is no obligation to terminate employment relationships with other employees only in order to be able to offer the disabled employee an alternative position.[88]

V.iv.b Promotion of inclusion and employment

The Directive not only prohibits discrimination based on the ground of disability, but it also promotes equality of disabled persons. In order to achieve that goal, i.e. in order to guarantee compliance with the principle of equal treatment in relation to persons with disabilities, reasonable accommodation shall be provided according to Article 5 of the Directive. 'This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.' Article 5 then also states when a burden is not proportionate: 'This burden shall not be disproportionate when it is sufficiently remedied by measures existing within the framework of the disability policy of the Member State concerned', i.e. as long as the Member State provides for sufficient compensation/subsidies, employers are obliged to take positive actions to promote the employment of disabled persons. Where the employer does not apply for available state subsidies, he or she infringes his or her duty to take appropriate measures to enhance the employment of persons with a disability.[89] Only if there are no public subsidies or compensation schemes must the test of proportionality with regard to the employer's burden be made without taking into regard the Member State's (non-existing) disability policy.[90]

This leads to the conclusion that at EU level, not only anti-discrimination of disabled persons but also equality of persons with a disability with regard to the labour market is one of the main goals of the Union's disability policy. However, apart from the fact that the employer is obliged to create access to employment in a wider sense, it is still unresolved what exactly employers can be obliged to do in order to promote the employment of disabled persons.[91]

Promotion of equality vs employer's fundamental rights According to Article 5 of the Directive, the employer cannot be obliged to take appropriate measures of enablement if these measures are a disproportionate burden for the employer. This restriction is necessary as, by obliging the employer to take these measures, his or her right to protection of property (e.g. as guaranteed by Article 1, First Protocol European Convention on Human Rights) is impaired, which is only admissible if the principle of proportionality is lived up to. Recital 21 of the Directive states that 'to determine whether the measures in question give rise to a disproportionate burden, account should be taken in particular of the financial and other costs entailed, the scale and financial

[88] Michaela Windisch-Graetz, 'Begriff der Behinderung und zumutbare Maßnahmen' [2014] *DRdA* 36; Austrian Supreme Court of Justice 2 June 2009, 9 ObA 21/08s.

[89] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 126.

[90] Franz Schrank and Theodor Tomandl, 'Ausgewähltes zum neuen Behindertenschutz. Das Zusammenspiel von Förderpflicht und Diskriminierungsverbot' [2006] *ZAS* 204 ff.

[91] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 130.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

resources of the organisation or undertaking and the possibility of obtaining public funding or any other assistance'. The Court of Justice also refers to these criteria when determining if a burden is disproportionate, but leaves it for the national court to assess that question.

In *Ring/Werge*, the Court of Justice held that in accordance with Recital 20 of the Directive and the wide definition of 'appropriate measures' in Article 2 para 4 of the UN Convention, which envisage not only material but also organisational measures, such as adapting 'patterns' of working time, i.e. the rhythm or speed at which the work is done, it cannot be ruled out that a reduction in working hours may constitute one of the accommodation measures referred to in Article 5 of the Directive.[92] In conclusion, every measure which is comprised in the employer's duty of care will have to be assessed as appropriate and proportional. According to the Austrian Supreme Court of Justice,[93] the employer's duty of care comprises offering the impaired employee any workplace suitable in accordance with his or her capacities. However, the employer is not obliged to carry out restructuring measures or to create new positions only because of his duty to take appropriate measures according to Article 5 of the Directive. Following *Ring/Werge*, it is most probably inadmissible to automatically qualify a reduction in working hours as disproportionate restructuring measure.[94]

The general aim is thus to weigh up the employer's interests, particularly his or her interest in protection of private autonomy, especially of choosing with whom to form a contractual relationship, against the disabled person's interests of becoming or remaining employed.[95] Also the Disability Strategy states that (although) the Strategy aims to improve the lives of individuals, as well as bringing wider benefits for society and the economy, it shall not be an undue burden on industry and administrations.[96] The restriction of the employer's right to protection of property is only proportionate if the public interest in the restriction prevails over the employer's interest of protection.[97] Furthermore, the restriction has to be necessary. As particularly Recitals 4–6, 8, 11 and 12 of the Directive show, the public interest in anti-discrimination and therefore in employment of disabled people is deemed to be very high. As Recital 11 states:

> [d]iscrimination based on … disability … may undermine the achievement of the objectives of the EC Treaty, in particular the attainment of a high level of employment and social protection, raising the standard of living and the quality of life, economic and social cohesion and solidarity, and the free movement of persons.

---

[92] Case C-335/11 *Ring/Werge* [2013] nyr [55].

[93] Austrian Supreme Court of Justice, 29 September 2008, 8 ObA 43/09w; 13 June 2002, 8 ObA 79/02d; 28 October 1986, 2 Ob 554/86.

[94] Michaela Windisch-Graetz, 'Begriff der Behinderung und zumutbare Maßnahmen' [2014] *DRdA* 35.

[95] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 139.

[96] [2010] COM 636 final 4.

[97] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 181; Austrian Constitutional Court 4 December 2007, G 113/06; 18 March 2006, G 79/05; 1 December 2003, G 298/02.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

The public interest which has to be considered comprises society's interest as a whole and especially of those financing unemployment protection schemes, i.e. the community of insured people, in reducing unemployment and therefore reducing social security – particularly unemployment – benefits. By promoting employment of disabled people, the costs for national social security schemes can be reduced.

Justification for discrimination? According to Article 2 para 2(b)(i) of the Directive, indirect discrimination on the grounds of disability may be justified: discrimination is indirect where an apparently neutral provision, criterion or practice would put persons having a particular disability at a disadvantage compared with other persons, unless (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) the employer or any person or organisation to whom this Directive applies, is obliged, under national legislation, to take appropriate measures in line with the principles contained in Article 5 in order to eliminate disadvantages entailed by such provision, criterion or practice.

Thus, as long as the employer takes appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training according to Article 5 of the Directive and as long as these measures do not impose a disproportionate burden on the employer, any indirect discrimination may be justified.[98] In other words: there is no indirect discrimination if e.g. the elimination of structural barriers was illicit or inappropriate because it would lead to a disproportionate financial burden.

The crucial question is whether an employer who does not live up to his or her duty to take appropriate measures in order to promote the employment of disabled people, automatically indirectly discriminates against persons with a disability. Article 5 of the Directive is not directly related to the provisions of the Directive concerning discrimination of disabled people but states only that appropriate measures shall be taken 'in order to guarantee compliance with the principle of equal treatment'. However, Article 2 of the UN Convention provides that discrimination on the basis of disability includes all forms of discrimination, including denial of reasonable accommodation. Thus, as the majority of the Member States as well as the EU itself are parties to the UN Convention and have also ratified the UN Convention, it seems very likely that the denial of reasonable accommodation as well as the denial of taking appropriate measures in general has to be qualified as indirect discrimination based on the ground of disability.[99] This point of view is supported by the Commission's Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation,[100] according to which a denial of reasonable accommodation is considered a form of discrimination (see e.g. Article 2.5 of the proposed Directive). However, the Commission concedes that individual measures for appropriate accommodation should only have to be taken if this would not impose a disproportionate burden. When judging whether a burden is

[98] Susanne Mayer, *Behinderung und Arbeitsrecht* (LexisNexis 2010) 239 ff.
[99] *Ibid* 245.
[100] [2008] COM 426 final.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

disproportionate, the specific situation of small and medium-sized, and micro enterprises, should be taken into account. Furthermore, in specific sectors such as insurance, banking and other financial services, the criterion 'disability' should not be regarded as constituting discrimination where this factor is shown to be a key factor for the assessment of risk.[101]

VI. EU STRATEGIES FOR PROMOTING EMPLOYMENT OF DISABLED PEOPLE

In its Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation,[102] thus in the *travaux préparatoires* for Directive 2000/78/EC, the Commission holds that 'various official estimates suggest that people with disabilities are at least two to three times more likely to be unemployed and to remain unemployed for longer periods than the rest of the working population'. As disability policy also faces the goal of minimising exclusion by enabling as many disabled people as possible to participate in the labour market,[103] and as the EU competences are limited regarding legislative measures in the fields of disability policy, Strategies are an important instrument to promote employment of disabled people.

VI.i Employment as Guarantee of Equal Opportunities

The current economic crisis has led to high unemployment rates among the working population in general that have not been experienced before. Several actions have been taken or are on their way to being implemented, above all the 2020 Strategy 'for smart, sustainable and inclusive growth',[104] which is, among other things, 'about more jobs and better lives'. Two of the five identified targets of the 2020 Strategy are employment and combating poverty.

In the 2020 Strategy, the Commission also acknowledges that disabled people belong to the most vulnerable groups in society and that therefore innovative education, training, and employment opportunities have to be provided in order to enable them to take full advantage of their potential.[105] The role of the Member States will be to 'define and implement measures addressing the specific circumstances of groups at particular risk' such as people with a disability.[106] Via the flagship initiative 'The

---

[101] Recital 15 of the proposal.

[102] Proposal for a Council Directive establishing a general framework for equal treatment in employment and occupation [1999] COM 565 final 4.

[103] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/Springer 2012) 127, 128.

[104] [2010] COM 2020 final.

[105] *Ibid* 20.

[106] *Ibid*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

European platform against poverty and social exclusion',[107] several platform actions have been taken or are about to be taken. Among these is the initiative No 35 'Promote the targeted use of Structural Funds (ESF and ERDF) to support the shift from institutional to community-based care in the areas of parentless children, disabled people and the elderly'.

The integration of disabled people in the labour market represents one of the biggest challenges for social and labour market policies. Health-impaired persons face a range of employment barriers, particularly because recent changes in technology and globalisation trends have led to a shift towards highly skilled jobs. As a result, there is a reduced demand for less-qualified types of labour, in which disabled persons are over-represented.[108]

The recent economic crisis particularly hit disadvantaged people hard and increased their inactivity and unemployment rates. The non-integration and non-participation of persons with a disability in the labour market causes both costs for the economy and social disadvantages for the persons concerned. Furthermore it reduces effective labour supply while at the same time increased expenditure for social transfers represents a burden for public finances as well as for the social security risk community. In 2009, incapacity-related spending amounted to 2.4% of the GDP in the OECD countries on average (OECD Social Expenditure Database).[109]

Strategies for improvement of that situation gain in importance, particularly because of demographic changes and a stagnating labour force in most European countries in the coming years. Thus, in order to secure economic growth and to diminish expenditure for social transfer, disabled people have to be mobilised for labour supply. Employment is crucial because it is a central factor for the social status and the personal identity of persons of working age. It should finally lead to equal opportunities, on the one hand, and full participation in economic, cultural and social life, on the other.[110]

However, despite the general shift in disability policies from welfare schemes and rehabilitation mechanisms to promoting equality and equal opportunities,[111] disability expenditure is still distorted towards passive transfers. In OECD countries 'at most 5% of the total budget is spent on occupational and rehabilitation programs'.[112] Furthermore, as we have seen in Section V.i, unemployment rates among disabled people are – despite these programmes – still growing much faster than among people without disabilities. For example, in Austria, in March 2014, unemployment rates among disabled people had grown by 29.4% compared with March 2013, whereas among

---

[107] <http://ec.europa.eu/social/main.jsp?catId=961&langId=en> accessed 28 February 2014.

[108] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014).

[109] *Ibid.*

[110] *Ibid.*

[111] See Section III.

[112] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014) with reference to BMASK (ed), 'Evaluierung des Behindertengleichstellungsrechts' (2012) BMASK Sozialpolitische Studienreihe Band 10, Vienna, 123f; OECD, *Sickness, Disability and Work: Breaking the Barriers* (OECD 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

persons without a disability, unemployment rates had only grown by 10%.[113] Not only unemployment rates, but also employment rates have to be considered when taking a look at the situation of disabled people on the labour market. In 2001, thus long before the current economic crisis, employment rates of disabled people were less than 30%, whereas among people without disabilities, 64.4% were in employment.[114] Also currently, disabled persons are employed to a lower extent (around 30–40% less) than persons without disabilities and are unemployed twice as often.[115]

VI.ii European Disability Strategy 2010–2020

The EU Commission states that 'full economic and social participation of people with disabilities is essential if the EU's Europe 2020 strategy is to succeed in creating smart, sustainable and inclusive growth. Building a society that includes everyone also brings market opportunities and fosters innovation.' It is recognised that 'the economic downturn has had an adverse impact on the situation of people with disabilities'. The overall aim of the Disability Strategy is 'to empower people with disabilities so that they can enjoy their full rights, and benefit fully from participating in society and in the European economy, notably through the Single market'.[116] Furthermore, the Disability Strategy is aimed at implementing the UN Convention at EU level.

Employment thus is a main area of the Disability Strategy. The Commission highlights the importance of quality jobs, which ensure economic independence, foster personal achievement, and offer the best protection against poverty. To achieve the EU's growth targets, more people with disabilities need to be in paid employment on the open labour market according to the Commission.[117]

However, due to the lack of competences of the EU in the fields of disability policy (apart from anti-discrimination policies), the Disability Strategy mainly focuses on identifying 'actions at EU level to supplement national ones', with employment as one of the eight areas for action.[118] As the 2020 Strategy for 'smart, sustainable and inclusive growth' shows, growth shall not only favour those who are already well equipped, but shall also promote employment of often socially and economically disadvantaged groups such as disabled people. Therefore, social inclusion of disabled people particularly focuses on their participation in the labour market. In accordance with these aims of the Europe 2020 Strategy, the Commission states in the Disability Strategy that it will 'exploit the full potential of the Europe 2020 Strategy and its Agenda for new skills and jobs by providing Member States with analysis, political guidance, information exchange and other support'. Among other things, it is the Commission's aim 'to step up its support for voluntary initiatives that promote diversity

---

[113] <www.ams.at/_docs/001_monatsbericht.pdf > accessed 17 April 2014.

[114] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 86 f; the data concerns only the EU-13; see also the statistics in Section V.i.

[115] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity,* Policy Brief (European Centre for Social Welfare Policy and Research 2014).

[116] [2010] COM 636 final 4.

[117] COM(2010) 636 final 7.

[118] *Ibid* 4.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

management at the workplace, such as diversity charters signed by employers and a Social Business Initiative'. In order to achieve these goals, particular use shall be made of the European Social Fund (ESF).

Thus, EU action is mainly focused on supporting and supplementing national action as well as supporting voluntary initiatives. There are no concrete measures on a hard-law basis at EU level obliging the Member States to implement the Disability Strategy, and as we will see in the following sections, especially due to the heterogeneity of the group of disabled people, obligatory measures such as quota-schemes are not the best and not the only way to enable disabled people and to promote their employment. Furthermore, as shown in Section V.ii., voluntary initiatives tend to be more flexible and are not subject to the burden of compliance, and therefore often give better results than obligatory provisions to which employers should have to adhere, but sometimes – particularly due to economic reasons – simply cannot do so.

VII. CONCRETE MEASURES TO PROMOTE EMPLOYMENT OF DISABLED PEOPLE

Data show that to employers, economically profitable employment of disabled persons is a central decisive factor. That implies the importance of the disabled person's service capability and adequate qualifications. As not all persons with disabilities can provide the capabilities and qualifications required on the labour market, potential supportive measures by public institutions are crucial. One supportive measure relatively easy to finance for governments is quota programmes. The employment of disabled persons is either supported by the fulfilment of the quotas or by employment programmes financed by the fees being paid by employers who do not fulfil the quota.[119] Once an employer has fulfilled the quota, the enterprise itself may receive state subsidies.

With regard to the employment effectiveness of quota systems, there has been only little analysis. Additionally, in available evaluations as a rule the environment of social insurance and employment policies remains unconsidered. Thus, it is hard to tell what impact quota systems have on the promotion of employment of disabled people, especially in comparison to other policy measures.[120] One of the reasons may be that measures to promote employment of disabled people on an equal basis are often short lived, restricted to specific employment sectors or regional areas, which makes any comparison practically unfeasible.

---

[119] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014), with reference to Stefan Doose, 'Unterstützte Beschäftigung im Kontext von internationalen, europäischen und deutschen Entwicklungen in der Behindertenpolitik' (2003) 27 *Impulse* 3–13, 8; OECD/Europäisches Zentrum, 'Behindertenpolitik zwischen Beschäftigung und Versorgung. Ein internationaler Vergleich' (2003) Wohlfahrtspolitik und Sozialforschung Band 12, Vienna, 231; Christian Sywottek, 'Berufliche Integration. Top oder Flop?' (2011) 3 *Menschen* 22–25, 24.

[120] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

Another way of promoting employment of persons with disabilities is to create incentives for the employers. While quota systems mainly focus on negative sanctions on employers not fulfilling the quotas, subsidised work is promoted by wage cost subsidies or exemption from taxes or social security contributions. Yet, these incentives also focus on limited abilities and not on the concept of capabilities.[121]

VII.i Quota Systems

As we have already seen, there are several programmes and initiatives to promote the employment of disabled people at EU level. Yet, all these programmes have to rely on the goodwill of the participating parties, especially the employer. It is notorious that without any legally binding provisions or subsidised programmes, employers would not employ nearly half of those disabled people who would like to participate in the labour market. Legislation therefore has created systems to encourage companies to employ disabled people and in this way to contribute to more social inclusion of disabled people and to relieve the burden of the social welfare systems.[122]

By introducing quota systems, employers shall be obliged to reserve a specific number of positions for disabled people. From an economic point of view, quota systems guarantee that all employers bear the burden of employing less productive, disabled employees. Yet, with regard to the aims of disability policy, by introducing quota regimes, rehabilitation and not promotion of equality is given priority.[123]

Furthermore, quota systems and anti-discrimination legislation are contrary approaches concerning the labour market integration of disabled persons.[124] By trend, quota systems stress the concept of 'limitation of abilities' and rely less on the concept of 'capability' – their focus is certainly not on promoting equal opportunities. They are implicitly based on the assumption that 'disabled people are unable to compete for an occupation on the open labour market'. Thus, a certain percentage of positions has to be reserved for disabled people. With regard to the different models of disability, quota schemes coincide only to a limited extent with the principle of equal access and equal

---

[121] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 152.

[122] Wolfgang Höfle, Michael Leitner and Lukas Stärker, *Rechte für Menschen mit Behinderung* (Linde Verlag 2006) 37.

[123] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 152.

[124] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014), with reference to Werner Eichhorst, Michael J Kendzia, Jonathan Benjamin Knudsen, Mette Okkels Hansen, Barbara Vandeweghe, Ingrid Verhoren, Eva Rückert, Bernd Schulte, 'The Mobility and Integration of People with Disabilities into the Labour Market' based on a study conducted for the European Parliament under contract IP/A/EMPL/FWC/2008-002/C1/SC4, IZA Research Report No 29, October 2010 37; Bent Greve, 'The Labour Market Situation of Disabled People in European Countries and Implementation of Employment Policies: A Summary of Evidence from Country Reports and Research Studies', Report prepared for the Academic Network of European Disability experts (ANED), Leeds, April 2009, 14.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

chances for all and therefore also only to a limited extent with the social model of disability.[125]

VII.i.a National approach – Austria

The employment contract is a contract which (also) follows the rules of private contract law. According to the principle of private autonomy, in general the parties cannot be forced to conclude an employment contract. It is the parties' right to decide whether, with whom and under what conditions to conclude an employment contract.[126] An exception to the principle of private autonomy and the freedom of contract is made regarding the employment of disabled people. According to § 1 para 1 Austrian BEinstG (*Behinderteneinstellungsgesetz* – Act on the employment of disabled people[127]), every employer who employs 25 or more people in Austria has to employ one disabled person with a disability degree of at least 50 per cent (a so-called *Begünstigter Behinderter* or 'favoured disabled person') per every 25 employees. The ministry of Labour, Social Affairs and Consumer Protection can reduce the obligation to one favoured disabled person per 40 employees. If the employer employs a favoured disabled person aged under 19, this person counts as two favoured disabled persons over 19.

In 2009, 22.4% of the employers who should have employed favoured disabled people did not meet this obligation. A total of 101,145 positions should have been created, whereas in reality, only 66,405 favoured disabled people were actually employed, i.e. in Austria there was a shortfall of 34% in positions.[128] One explanation can be found in the fact that the employer can buy his way out by paying EUR 226, 316 or 336 monthly, depending on the size of the company (EUR 226 for companies with fewer than 100 employees, EUR 316 for companies with 100 to 399 employees and EUR 336 for companies with at least 400 employees). Especially for economically successful companies, these lump sums are easy to pay.

VII.i.b Efficiency of quota systems?

There is no empirical evidence that quota systems lead to higher employment rates of disabled people: higher employment rates can be found on the one hand in countries with employment quotas, other employer obligations and incentives, widespread subsidised employment, etc, but on the other hand, also in countries where none of these measures are implemented. According to Fuchs, the limited empirical evidence suggests that most measures serve to secure working places of already employed

---

[125] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014).

[126] Franz Marhold and Michael Friedrich, *Österreichisches Arbeitsrecht* (Verlag Österreich 2012) 12.

[127] *BGBl* 1970/22 https://www.ris.bka.gv.at/GeltendeFassung.wxe?Abfrage=Bundesnormen&Gesetzesnummer=10008253 accessed 28 February 2014.

[128] Jochen Hartmannshenn, 'Pflicht zur Beschäftigung behinderter Menschen – Rechtsvergleich Österreich und Deutschland', in Paula Aschauer and Elisabeth Kohlbacher (eds), *Jahrbuch Sozialversicherungsrecht 2012* (NWV 2012) 142.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

persons, but contribute little to new occupations of disabled persons.[129] Although, e.g. in Austria, an increase of the non-compliance tax of 30 per cent for those employers not adhering to the obligatory quotas led to a 2.5% increase in the average number of disabled people in employment, quota systems generally – especially when there are no sanctions – tend to be disregarded.[130] Furthermore, in most of the cases quota systems do not take into account the employers' possibilities of actually providing an adequate work place for a disabled person. Thus, by promoting rather work place adaptation-measures or special vocational training for disabled people in order to make them 'fit' for a specific position, there could certainly be more achieved than by 'simple' quota systems.

To conclude, quota systems are relatively easy to introduce, although a specific regulatory authority is needed to prove the fulfilment of the quotas. In addition, in most countries where quota systems exist, disabled people are registered in one way or another in order to be able to tell whether by employing a specific person, the quota is fulfilled or not. Finally, quota systems seem to help already disabled people in remaining employed or obliging employers to retain employees who become disabled during the employment relationship. However, quota systems are not deemed to be an efficient instrument in promoting the hiring of new employees who are disabled or likely to become disabled in the foreseeable future.[131] This conclusion is supported by current unemployment data of disabled people in Austria – although employment rates of disabled people have risen, as we have seen in Section V.i. of this chapter, unemployment rates have also risen.

VII.ii Promoting Employment by Reducing (Special) Protection Schemes?

As early as in its 1986 Recommendation on the employment of disabled people in the Community,[132] the Council states that in a period of economic crisis, action at European and Community levels should not only be continued, but also be intensified in order to promote the achievement of equal opportunity by means of positive and coherent policies. However, as the Austrian example shows, as long as there are no binding EU provisions, national legislators nevertheless try to diminish special protection schemes in order to promote employment of disabled people – as we will see, without success.

---

[129] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research 2014) with reference to OECD, *Sickness, Disability and Work: Breaking the Barriers* (OECD 2010) 50/135.

[130] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/ Springer 2012) 127, 143, with reference to J-P Wuellrich, 'The Effects of Increasing Financial Incentives for Firms to Promote Employment of Disabled Workers' (2010) 10(7) *Econ Letters* 173–176.

[131] Christoph M Schmidt, 'Transforming Disability into Ability: What Can Employers Do? The OECD Report and its Policy Conclusions' in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies* (Ashgate 2004) 293, 294.

[132] [1986] OJ L 225, 43–47.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

VII.ii.a National approach – Austria

In Austria as well as e.g. in Germany and the Netherlands,[133] disabled people enjoy special protection regarding the termination of the employment contract.[134] Again, extended protection against the termination of the employment contract follows the concept that persons with disabilities have limited abilities and are therefore more likely to stay unemployed after having lost their job.

In Austria, according to § 8 para 2 BEinstG, the employment relationship with a favoured disabled person may only be terminated by the employer if the so-called 'Behindertenausschuss' (special committee for disabled people, hereafter 'the committee') has given its prior consent to the termination. Only in very special cases may the committee give its consent after the employer has issued the termination. If the employer does not inform the committee about the presumptive termination and/or if the committee does not give its consent, the termination is not valid, which means that the employment relationship continues to exist.

Before 2010, these special protection provisions applied only to employment relationships with a favoured disabled person which had lasted for at least six months, unless the fact that the employee was a favoured disabled person was established during these six months. However, from January 2011[135] onwards, special protection for disabled people against dismissal underwent some significant changes in Austria. This special protection now only applies when the employment relationship has lasted for four years. The Austrian legislator used as an argument that in this way, employers should be encouraged to employ more disabled people. However, as the current unemployment data for disabled people in Austria show, the legislative amendments that led to the abolishment of special protection against dismissal during the first four years of employment have not promoted any employment of disabled people. On the contrary, unemployment rates have even risen, although the government's aim was to encourage employers to employ more disabled people.

VII.ii.b EU level: The *Ring/Werge* judgment

As we have seen before, at EU as well as at national level, actions are taken to promote the employment of disabled people. However, not only the employees', but also the employers' interests have to be taken account of, especially in economically difficult times during which particularly SMEs simply cannot afford to employ people who are not as highly efficient as needed for a specific position.

The discrepancy between these interests is also obvious in the judgments of the Court of Justice. In a recent judgment, *Ring/Werge*,[136] the Court reasoned that it can be justified to apply reduced periods of notice due to the fact that the worker concerned

---

[133] Michael Maschke, *Behindertenpolitik in der Europäischen Union* (VS Verlag für Sozialwissenschaften 2008) 146.

[134] Jochen Hartmannshenn, 'Pflicht zur Beschäftigung behinderter Menschen – Rechtsvergleich Österreich und Deutschland', in Paula Aschauer and Elisabeth Kohlbacher (eds), *Jahrbuch Sozialversicherungsrecht 2012* (NWV 2012) 137.

[135] *BGBl* 2010/111 https://www.ris.bka.gv.at/Dokument.wxe?Abfrage=BgblAuth&Dokumentnummer=BGBLA_2010_I_111 accessed 28 February 2014.

[136] Case C-335/11, 337/11 *Ring/Werge* [2013] nyr.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

has been frequently absent because of a disability if the aim is to promote the recruitment of persons with disabilities.

In Case C-337/11, Ms Skouboe-Werge had been employed as an administrative assistant. After suffering whiplash following a road traffic accident and having been certified sick for three weeks, she initially resumed her full-time employment. It then became clear that she could not work full time any more and finally, Ms Skouboe-Werge was dismissed following a provision in Danish law according to which the employee may be dismissed with *one month's notice* to expire at the end of a month, if the employee has been in receipt of salary during periods of sickness amounting in total to 120 days in any period of 12 consecutive months.[137] This one-month-notice period is shorter than the regular notice periods, which shall be – depending on the period of service – increased up to a maximum of six months.[138] Ms Skouboe-Werge's degree of disability was assessed as 10% and the reduction in her capacity for work as 65%. One question before the Court was whether this provision in Danish law violates Directive 2000/78 in the case of an employee who must be regarded as disabled within the meaning of the Directive, where the absence is caused by the disability.[139]

The Court first lays down the concept of disability following its judgment in *Chacón Navas*,[140] adapting it with reference to the definition of disability in the UN Convention.[141] With regard to the question whether the Danish provision with the reduced notice period violates Directive 2000/78, the Court first reasons that there is a violation of the Directive if the absences due to which the employment contract may be terminated with the reduced notice period are the consequence of the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation laid down in Article 5 of the Directive.[142]

However, the Court then had to answer the question whether that national provision, under which an employer can terminate the employment contract with a reduced period of notice if the disabled worker concerned has been absent because of illness, with his salary being paid, for 120 days during the previous 12 months, where those absences are the consequence of his disability, is precluded by the Directive, even if the absence is caused by the disability and not by the employer's failure to take the appropriate measures in accordance with the obligation to provide reasonable accommodation.[143]

The Court reasons that this provision applies to disabled people as well as to people without any restrictions and that therefore the national provision does not contain direct discrimination on grounds of disability.[144] However, the national provision is likely to bring about a difference of treatment indirectly based on disability, as disabled people are more likely to suffer from illnesses and to reach the limit of 120 days of paid sick leave.[145] This argument is based on Advocate General Kokott's Opinion that 'generally

---

137 Case C-335, 337/11 *Ring/Werge* [2013] nyr [13].
138 *Ibid* [12].
139 *Ibid* [26].
140 Case C-13/05 *Chacón Navas* [2006] ECR I-6467 [43].
141 See Section I.
142 Case C-335, 337/11 *Ring/Werge* nyr [68].
143 *Ibid* [69 ff].
144 *Ibid* [74].
145 *Ibid* [76].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

speaking, employees with a disability have a much higher risk of contracting an *illness* connected with their disability than employees without a disability. The latter can contract only "general" illnesses. Employees with a disability, on the other hand, can additionally contract a "general" illness.'[146]

The Court then reaches the crucial question when it asks whether that difference of treatment between workers without any incapacities and disabled people is – according to Article 2(2)(i) of the Directive – objectively justified by a legitimate aim and whether the means used to achieve that aim are appropriate and do not go beyond what is necessary to achieve the aim pursued by the Danish legislature.[147] The Danish government made its point in arguing that the Danish provision aims at

> encouraging employers to recruit and maintain in their employment workers who are particularly likely to have repeated absences because of illness, by allowing them subsequently to dismiss them with a shortened period of notice, if the absences tend to be for very long periods. As a counterpart, those workers can retain their employment during the period of illness.[148]

With regard to the Member States' 'broad discretion' in 'choosing to pursue a particular aim in the field of social and employment policy but also in defining measures to implement it',[149] the Court of Justice states that 'encouragement of recruitment undoubtedly constitutes a legitimate aim of the social or employment policy of the Member States'. That assessment 'must evidently apply to instruments of national employment policy designed to improve opportunities for entering the labour market for certain categories of workers'. A 'measure taken to promote the flexibility of the labour market may be regarded as a measure of employment policy'.[150] According to the Court of Justice, '(i)t may be accepted that, by providing for the right to make use of a shortened period of notice for the dismissal of workers who have been absent because of illness for over 120 days, that rule has the effect, for employers, of encouraging recruitment and maintenance in employment',[151] although 'the risks run by disabled persons, who generally face greater difficulties than non-disabled persons in re-entering the labour market, and have specific needs in connection with the protection their condition requires, should not be overlooked'.[152] With regard to a social plan, the Court of Justice has decided that 'in ultimately paying a severely disabled worker compensation on termination on operational grounds which is lower than the amount paid to a non-disabled worker, the measure has an excessive adverse effect on the legitimate interests of severely disabled workers'.[153] That measure therefore violated the Directive.

---

146 Opinion of Advocate General Kokott, delivered on 6 December 2012, C-355/11, in Case 337/11 [67].
147 Case C-335, 337/11 *Ring/Werge* [2013] nyr [77].
148 *Ibid* [78].
149 *Ibid* [81].
150 *Ibid* [82].
151 *Ibid* [88].
152 *Ibid* [91].
153 Case C-152/11 *Odar* nyr [68].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

VII.iii Support by the ESF

As the previous sections have shown, neither quota systems nor measures reducing (special) protection schemes have led to higher employment rates of disabled people. Thus, other ways of supporting employers need to be found in order to minimise unemployment rates and promote employment of disabled people. One important player in promoting employment of disabled people is the ESF. Its aim is to support education and qualification of socially disadvantaged people and therefore to enforce their participation in the labour market. Disadvantages and discrimination in the world of work shall be reduced so that all people have a labour market perspective. All Member States develop their own strategy in the framework of an Operational Programme.

There is no direct funding of individuals by means of the ESF, but funding of initiatives and programmes launched by public administrations, non-governmental organisations, charitable organisations and the social partners working in the field of employment and social inclusion.

ESF-funded initiatives also took and take place in Austria. These initiatives seem to be much more promising than the reduction of special protection with regard to dismissal of disabled people. For the period 1st January 2007 until 31st December 2013, the ESF provided a budget of 472 million euros in Austria. This was complemented by 642 million euros from national budgets. The priorities of the funding were laid down in the Operational Programme for Employment.[154]

In this period, there were six key areas of funding, among them key area 3 'Social Inclusion' with special focus in key area 3a 'Social Inclusion of Disabled People'. Its aim is to improve the competitiveness of young disabled people and to enable their access to the labour market, but also to help these people stay in the labour market. One of the main target groups are unemployed disabled people aged 15 to 25. The concrete measures were:

- assistance for youth welfare work;
- clearing measures; and
- socially inclusive apprenticeship programmes.

Specific programmes, e.g. *Specialisterne*,[155] follow the approach of focusing on disabled people's abilities and capabilities rather than on their incapabilities. Disabled people are supported in order to be able to participate in the open labour market on an equal basis. As a result, their remuneration should be the same as for employees without disability, thus state subsidies are made redundant. This concept therefore takes full regard of the social model of disability and in addition not only promotes the disabled persons', but also the employer's interests: there is not even a necessity to weigh employees' interests against employer's interests.

---

[154] <www.esf.at/esf/english-info/> accessed 28 February 2014.

[155] German word game: 'Specialists' combined with 'sterne' meaning 'stars' in English; for more details: <www.specialisterne.at/home> accessed 28 February 2014.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

VII.iv Alternative Approach: Subsidising Employment via Health and Safety Provisions

It is clear that neither the implementation only of quota systems nor only granting benefits to disabled people will improve their situation on the labour market. As disability policy also focuses on the disabled people's environment, efforts have to be made to support employers and enable them to offer positions to disabled people who are able to perform the work required by the specific position. As we have seen in the sections above, the EU's competences are rather limited in terms of binding disability policy schemes. The subject of reasonable accommodation is only addressed within the scheme of the anti-discrimination Directive 2000/78/EC.[156]

Within the EU's competences, a possible way of encouraging and potentially obliging employers in adapting their workplaces for disabled people could be to create legislative measures based on health and safety at work. According to Askenazy, strain at work (e.g. stress or tensions between workers) is a barrier to returning to work. Thus, workplace organisation is an important factor when trying to create positions suitable for disabled people.[157] Hvinden names, among other things, the provision of good and safe working conditions and – if required – appropriate adjustments in job arrangements as crucial factors in order to encourage and to enable disabled people to take up or to continue in work.[158]

As the EU is not competent to issue hard law (especially directives) with regard to combating social exclusion of workers, a possible basis for binding directives in the field of work place adaptation for disabled people could be Article 153 para 1 lit a TFEU on 'improvement in particular of the working environment to protect workers' health and safety'. The terms 'working environment' and 'workers' health and safety' are vague and leave space for interpretation regarding the EU's legislative activities. The Court of Justice has confirmed that these terms must not be interpreted restrictively, but rather as 'embracing all factors, physical or otherwise, capable of affecting the health and safety of the worker in his working environment'. According to the Court, the words 'especially in the working environment' militate in favour of a broad interpretation of the powers which Article 118a (now Article 153 para 1 lit a TFEU) confers upon the Council for the protection of the health and safety of the workers.[159]

Yet, workplace adaptation should and must not impose an unreasonable burden on the employer according to Article 5 Directive 2000/78/EC. Thus, at national level,

---

[156] Cf. Article 5 of the Directive; see also Article 15 para 2 Revised European Social Charter.

[157] Philippe Askenazy, 'Employers and Disability: Adapting Modern Work Organizations', in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies* (Ashgate 2004) 307, 311.

[158] Bjørn Hvinden, 'How to Get Employers to Take on Greater Responsibility for the Inclusion of Disabled People in Working Life?', in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies* (Ashgate 2004) 333, 337.

[159] Case C-84/94 *United Kingdom v Council* 1996 [ECR] I-5755, 15; Gerhard Hesse, 'Article 153 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV* (Manz 2012) para 8; Berta Valdés de la Vega, 'Occupational Health and Safety: An EU Law Perspective', in Edoardo Ales (ed), *Health and Safety at Work* (Wolters Kluwer 2013) 7.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

financing schemes need to be developed that support employers when adapting their positions to the needs of an individual disabled person.[160]

VIII. CONCLUSIONS AND FUTURE PROSPECTS

Although the EU's legislative competences regarding disability policy are fairly restricted, nevertheless there is action at EU level promoting social inclusion of disabled people. The aim nowadays is not only to minimise poverty among this heterogeneous group of people, but to enhance equality, support integration and avoid exclusion, and also to enhance economic efficiency; the environment's costs shall be kept at a low basis. These goals shall be reached particularly by supporting and promoting participation in the regular labour market. By achieving income security for disabled people, the economic costs for the social welfare state and the social security risk community in general shall be reduced. One main goal seems to be the reduction of the so-called 'benefit trap', according to which disabled people – due to relatively high (social security) state benefits – remain unemployed rather than trying to make use of their capacities.

Directive 2000/78/EC focuses on equality of disabled people and obliges the Member States to guarantee anti-discrimination in employment and occupation. Any national provisions which contain direct discrimination on grounds of disability undermine the protection of disabled people provided for by the Directive. Economically difficult situations cannot justify any deviation from that principle. However, provisions which are likely to produce a difference of treatment indirectly based on disability may be justified by economic interests, i.e. by employers' interests, but also by interests of other, younger employees, as we have seen e.g. in the Court of Justice judgments concerning old-age discrimination.[161] The Directive furthermore obliges the Member States to guarantee for employers taking appropriate measures regarding reasonable accommodation of disabled persons, unless such measures would impose a disproportionate burden on the employer. This provision makes it clear that although on the one hand employment of disabled people shall be promoted it cannot be – on the other hand – at the exclusive expense of the employers. As Article 3 TEU states, working for a highly competitive social market economy is ultimately aimed at full employment and social progress. Thus, only by guaranteeing a competitive social market economy and therefore by promoting employers' competitiveness and not by imposing non-fundable measures to guarantee reasonable accommodation of disabled persons, can the goals of employment and social progress be reached.

Yet, as the *Ring/Werge* judgment has shown, if appropriate measures that should have been taken according to Article 5 of the Directive lead to absences of a disabled person which finally result in the employer's right to premature termination of the employment contract, the failure to take appropriate measures represents indirect discrimination.

---

[160] See e.g. Rick van der Ploeg, 'Role of Employers in Transforming Disability into Ability: Learning from Dutch Mistakes' in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies* (Ashgate 2004) 341, 345.

[161] E.g. Case C-356/09 *Kleist* [2010] ECR I-11939.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

Thus, even when applying apparently neutral national provisions the employer may act unlawfully where he or she does not adhere to his/her duty of providing reasonable accommodation. By offering more subsidies for workplace adaptation measures, Member States could therefore indirectly oblige employers to take appropriate measures according to Article 5 of the Directive: where employers do not take the measures, although being offered subsidies, the consequences may be condemnation for indirect discrimination – a verdict which the majority of employers certainly would want to avoid.

Specific provisions which grant disabled people more protection, e.g. from being dismissed, may be amended *in peius*, i.e. to the employee's disadvantage, without producing any discrimination because even the amended provision grants disabled people more rights with regard to the termination of an employment contract compared with people without any restrictions. By amending these provisions, the employment of disabled people shall be promoted. Especially in economically difficult times where unemployment rates in general are extremely high, such measures seem to be admissible. In the end, employers will always find a way to terminate the employment relationship, regardless of whether the employee is disabled or not, if the employee does not fulfil his or her duties deriving from the employment contract and if the situation is economically unbearable for the employer. Furthermore, once the employer has realised that also the services of a disabled person can promote economic success, it will not matter if special protection provisions for disabled employees are applicable after six months or four years. In addition, according to a US study cited by the UN, employees with disabilities have better retention rates, reducing the high cost of turnover. Other American surveys even revealed that after one year of employment, the retention rate of persons with disabilities is 85 per cent.[162]

However, it is clear that in order to promote employment of disabled people, individual measures like reducing special protection schemes will not produce any positive effect. As was shown in Sections VI.i. and VI.ii., quota schemes and reduction of special protection regimes are – if at all – only to a very small extent able to promote employment of disabled people. Thus, for all stakeholders (disabled persons, employers, institutions and service providers), more incentives and support have to be implied to keep disabled persons in employment as well as to enable new employment.[163] As the Disability Strategy shows, even after the adoption of Directive 2000/78/EC, employment rates of disabled people are still low compared with people without disabilities and there is still a strong need for measures to be taken to promote employment of disabled people. Taking into account the focal points of the Disability Strategy, individually targeted employment policies seem to be the most promising policies in order to guarantee disabled people employment and thus full social recognition.

---

[162] *Some Facts about Persons with Disabilities* <www.un.org/disabilities/convention/facts.shtml> accessed 21 February 2014.

[163] Michael Fuchs, *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, Policy Brief (European Centre for Social Welfare Policy and Research (2014); OECD, *Sickness, Disability and Work: Breaking the Barriers* (OECD 2010) 12, 19.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

Sloane and Jones emphasise that employers have to be encouraged to hire, utilise effectively and retain disabled employees. As we have seen, less protection for disabled employees with regard to the termination of the employment contract does not necessarily lead to higher employment rates. On the contrary, especially in economically difficult times, unemployment rates of disabled people have risen rather than dropped. Thus, a reduction of protection schemes with regard to the termination of the employment contract does not seem to be an appropriate measure to encourage employers to retain disabled employees. Work subsidies, accommodation schemes and personalised support from public services are recognised as more effective tools to promote employment of disabled people.[164]

As the *Ring/Werge* judgment shows, one crucial point is the disabled person's ability to work: as long as disabled people are able to work, disability policy should focus on their remaining in employment, even if that means that disabled people only work part time and get subsidised as well in order to compensate for the income loss due to the non-ability to work more hours. With regard to invalidity pensions and other social welfare schemes and the apparent attractiveness of receiving an invalidity pension or other social benefits rather than working, even if only part time, more effort should be made to identify which persons are still capable and able to work and which persons are rather eligible for invalidity and other social welfare schemes. One of the key factors seems to be supporting disabled people still (partly) able to work in order to maintain the incentive to work and therefore closing not only the benefit,[165] but also the poverty[166] trap. Furthermore, working has to be more attractive from a monetary point of view than staying at home. In this way, high rates of invalidity pensions and the high cost of other social welfare schemes as well as the burden of the social security risk community could be reduced. As the 2002 survey has shown, the average income of persons with disability is much lower than that of persons without restrictions. The guarantee of equal pay for equal work is another important factor for promoting income security and for diminishing dependency on social security benefits, particularly as this guarantee is one of the few measures Member States as well as employers are legally obliged to adhere to according to Article 3 para 1.c. of the Directive.

There is common acceptance nowadays that ensuring and supporting employment of disabled people is a more appropriate policy than subsidising persons with disability still able to work and thus burdening social welfare schemes.[167] The latter strategy tends to be more expensive,[168] not only from a material point of view for the social

---

[164] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/Springer 2012) 127, 145.

[165] *Ibid* 146.

[166] D Stapleton, B O'Day, G Livermore and A Imparato, 'Dismantling the Poverty Trap: Disability Policy for the Twenty-first Century' (2006) 84(4) *The Milbank Quarterly* 701–732.

[167] Christoph M Schmidt, 'Transforming Disability into Ability: What Can Employers Do? The OECD Report and its Policy Conclusions' in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies* (Ashgate 2004) 293, 297.

[168] PJ Sloane and MK Jones, 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences* (Physica-Verlag/Springer 2012) 127, 142.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

welfare state, but also for disabled people themselves: income support may save people from poverty but not from social exclusion which – in the end – is from the psychological and social point of view much more at the expense of the people concerned. Thus, it is widely accepted that in order to make the employer's involvement a reality, it is necessary to implement a policy mix of sticks and carrots, i.e. a mix of legal obligations, financial incentives and communicative means promoting the awareness, knowledge and practical skills needed.[169]

BIBLIOGRAPHY

Askenazy, P (2004), 'Employers and Disability: Adapting Modern Work Organizations', in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies*, Aldershot: Ashgate 307.

Berkowitz, Edward D (1987), *Disabled Policy: America's Programs for the Handicapped*, Cambridge: Cambridge University Press.

Fuchs, Michael (2014), *Quota Systems for Disabled Persons: Parameters, Aspects, Effectivity*, *Policy Brief*, Vienna: European Centre for Social Welfare Policy and Research http://www.euro.centre.org/data/1393943316_63424.pdf.

Hartmannshenn, Jochen (2012), 'Pflicht zur Beschäftigung behinderter Menschen – Rechtsvergleich Österreich und Deutschland', in Paula Aschauer and Elisabeth Kohlbacher (eds), *Jahrbuch Sozialversicherungsrecht*, Vienna: NWV 142.

Heady, Christopher (2002), 'Sickness and Disability', in Matt Barnes et al (eds), *Poverty and Social Exclusion in Europe*, Cheltenham: Edward Elgar Publishing 101.

Hesse, G (2012), 'Article 153 TFEU,' in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV*, Vienna: Manz.

Höfle, Wolfgang, Michael Leitner and Lukas Stärker (2006), *Rechte für Menschen mit Behinderung*, 3rd edition, Vienna: Linde Verlag.

Hvinden, Bjørn (2004), 'How to Get Employers to Take on Greater Responsibility for the Inclusion of Disabled People in Working Life?', in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies*, Aldershot: Ashgate 333.

Kohlbacher, Elisabeth (2014), *Streikrecht und Europarecht*, Vienna: Linde Verlag.

Laimer, Hans Georg and Lukas Wieser (2013), 'EuGH: Anpassung des Behinderungsbegriffs und Teilzeitarbeit als verhältnismäßige Vorkehrungsmaßnahme', *RdW* 398.

Marhold, Franz and Michael Friedrich (2012), *Österreichisches Arbeitsrecht*, 2nd edn, Vienna: Verlag Österreich.

Maschke, Michael (2008), *Behindertenpolitik in der Europäischen Union*, Vienna: VS Verlag für Sozialwissenschaften.

Mayer, Susanne (2010), *Behinderung und Arbeitsrecht*, Vienna: LexisNexis.

Mikkola, Matti (2010), *Social Human Rights of Europe*, Helsinki: Karelactio.

OECD (2010), *Sickness, Disability and Work: Breaking the Barriers*, Paris: OECD.

Oswald, N (2012), 'Article 10 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV*, Vienna: Manz.

Rebhahn, Robert and Michael Reiner (2013), 'Article 153 TFEU' and 'Article 151 TFEU' in Jürgen Schwarze (ed), *EU-Kommentar*, 3rd edition, Basel: Helbing & Lichtenhahn.

Ross, Friso, 'Article 21 Charter of Fundamental Rights', in Jürgen Schwarze (ed), *EU-Kommentar*, 3rd edition, Basel: Helbing & Lichtenhahn.

Schmidt, Christoph M (2004), 'Transforming Disability into Ability: What Can Employers Do? The OECD Report and its Policy Conclusions' in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies*, Aldershot: Ashgate 293.

Schrank, Franz and Theodor Tomandl (2006), 'Ausgewähltes zum neuen Behindertenschutz. Das Zusammenspiel von Förderpflicht und Diskriminierungsverbot', *ZAS* 204.

[169] Bjørn Hvinden, 'How to Get Employers to Take on Greater Responsibility for the Inclusion of Disabled People in Working Life?' in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies* (Ashgate 2004) 333, 336.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

Sloane PJ and MK Jones (2012), 'Disability and Social Exclusion', in Giuliana Parodi and Dario Sciulli (eds), *Social Exclusion. Short and Long Term Causes and Consequences,* Heidelberg: Physica-Verlag/ Springer 127.

Sporrer, Anna (2012), 'Article 19 TFEU', in Heinz Mayer and Karl Stöger (eds), *EUV/AEUV*, Vienna: Manz.

Stapleton, D, B O'Day, G Livermore and A Imparato (2006), 'Dismantling the Poverty Trap: Disability Policy for the Twenty-first Century', *The Milbank Quarterly* **84**(4) 701–732.

Valdés de la Vega, Berta (2013), 'Occupational Health and Safety: An EU Law Perspective', in Edoardo Ales (ed), *Health and Safety at Work*, Alphen a/d Rijn: Wolters Kluwer 1–27.

Van der Ploeg, Rick (2004), 'Role of Employers in Transforming Disability into Ability: Learning from Dutch Mistakes', in Bernd Marin, Christopher Prinz and Monika Queisser (eds), *Transforming Disability Welfare Policies*, Aldershot: Ashgate, 341.

Windisch-Graetz, Michaela (2014), 'Begriff der Behinderung und zumutbare Maßnahmen' *DRdA* 34.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:03:06PM
via University College London (UCL)

13. Principles of EU coordination of social security

Frans Pennings

I. INTRODUCTION

In the case law of the Court of Justice and publications on EU coordination of social security the word *principle* is often used. Also EC Coordination Regulation 883/2004 refers to principles in the preamble or its articles. The principles were often derived from the case law of the Court; by inserting them in the Regulation their status is confirmed.

Although this may at first sight seem to make it easy to write on principles in European social security law, that is not necessarily the case. As a result of the abundant use of the term, the question arises what the value is of these principles, how they relate to each other, and how they can be ordered. Therefore the precise meaning and function of the principles underlying coordination of social security in the EU deserve further analysis.

I will first discuss the concept of coordination (Section II), since this is very relevant to the principles for coordination. In Section III, I will describe the main principles that are often mentioned in EU coordination law and, in particular, how these have been used and interpreted within the EU framework, how exceptions to these principles are made and accounted for. I will also mention possible alternatives for the principles chosen and discuss these.

In Section IV, I will draw my conclusions on the status of the principles and the special characteristics of EU coordination law that can be derived from these principles. Section V will discuss some areas for further research that address obstacles to free movement that are difficult to remove or cannot be removed by coordination rules.

II. COORDINATION AND ITS LIMITATIONS

For the purpose of identifying the principles of coordination law, it is important to define the term 'coordination'. Coordination refers to the rules that intend to bridge the differences between social security schemes (and the differences between national and international regulations (e.g. bilateral agreements)), which affect the social security position of persons whose social security position is or was connected to different countries. For instance, if one country requires one year as the qualification period for the right to unemployment benefit and the other country's legislation requires six months, these differences are not taken away by coordination. Coordination rules, however, establish that when the first country takes only periods fulfilled in its own territory into account, also the periods completed in the other Member State count for the purpose of qualifying for the right to this benefit.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

Thus coordination does not take away all differences between systems, including negative effects of crossing borders, nor does it compensate for their effects, since the Treaty on the Functioning of the EU (TFEU) does not – the Court of Justice has consistently held – give the competence for harmonising social security schemes, and therefore negative effects of free movement may continue to exist.

This does not change the fact that the distinction between coordination and harmonisation is not always as sharp as it seems and the principles of coordination are important to explain which types of differences between schemes are bridged and which are not.

The axiom that the Treaty gives a legal basis for coordination rules, not for harmonisation rules, can be found in several judgments of the Court of Justice. One important example is the *Pinna* judgment.[1] In this judgment the issue was Article 73(2) of the then coordination Regulation, Regulation 1408/71, which made, at the time, a distinction between France and the other Member States with respect to family benefits. The provision concerned provided that persons employed in France with family members residing in another Member State received family benefits provided for by the legislation of the Member State where the family members resided, whereas for other Member States the level of the State of employment applied. As a result, persons employed in France received for their children residing, for example, in Greece, family benefit in accordance with the Greek rules.

The Court started its reasoning by mentioning that as regards the difference in treatment between workers due to the coordination Regulation, it must be observed that the coordination provision of the Treaty provides for the coordination, not the harmonisation, of the legislation of the Member States. As a result there remain differences between the Member States' social security systems. However, the principle of equal treatment prohibits not only overt discrimination based on nationality, but all covert forms of discrimination which, by applying other distinguishing criteria, in fact achieve the same result. Therefore the disputed rule of the coordination Regulation was inconsistent with the Treaty.

If we look more closely at the Court's argument, it appears that the consideration that the Treaty does not give the power for harmonisation is not really necessary for the reasoning of the Court. After all, none of the parties proposed to harmonise the national schemes involved. Instead, the Court's remark seems to be mainly made as an apology: even though the Treaty does not give the powers for harmonisation, it does not allow discrimination or growing disparities as the result of the application of EC law. To put it otherwise: although declaring a provision of the Regulation partially void, and although this means that France is now treated the same as other Member States, which certainly has a harmonising effect, this does not mean that we interpret the Treaty as harmonising the schemes. In other words, 'we' – the Court – are not going too far in our interpretation.

The *Pinna* judgment was an important decision, since it showed that the application of the Treaty's equal treatment provision has a certain harmonising effect.

If differences between national schemes are allowed there will soon be negative effects for migrants. If these are not allowed any more by the Treaty's provision

[1] Case 41/84 *Pinna* [1986] ECR 1.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

prohibiting indirect discrimination, this can lead to (in fact) a far-reaching assimilation of national schemes. The Court was aware of this; maybe for this reason in the *Coonan* judgment,[2] it was cautious about applying the non-discrimination rule, as it would indeed lead to a form of harmonisation. In this case insurance for sickness benefit was possible for persons over 65 only if they received a British old-age pension. Since Mrs Una Coonan had worked in Ireland only before she retired, she did not qualify for a British pension and thus she was not insured for sickness benefits.

The Court did not require the UK to treat the Irish pension as a British pension for this purpose. It considered that it is for the legislature of each Member State to lay down the conditions creating the right or the obligation to become affiliated to a social security scheme or to a particular branch under such a scheme, provided that there is no discrimination between nationals of the host State and nationals of other Member States. The coordination Regulation does not compel Member States to treat as equivalent insurance periods completed in another Member State with those which were completed previously on national territory, the Court reasoned.

Now we have discussed the main characteristics and limitations of coordination, we can take the coordination principles into account.

III. THE MAIN PRINCIPLES OF EU COORDINATION LAW

III.i Introduction

The Treaty itself does not lay down principles for coordination. Instead Article 48 TFEU, currently the legal basis for the coordination Regulation, mentions the obligation for the Council: it has to take such measures in the field of social security as are necessary to provide freedom of movement for workers. It also mentions two tasks that have to be carried out in any case: (a) aggregation, for the purpose of acquiring and retaining the right to benefit and of calculating the amount of benefit, of all periods taken into account under the laws of the several countries; (b) payment of benefits to persons resident in the territories of Member States.

Article 45 TFEU entails the principle of non-discrimination on the ground of nationality and this is a third task to be realised.

Another important task for coordination is to determine the social security legislation applicable. Remarkably enough this task is not mentioned in Article 48, even though it is a very important objective of coordination rules.

As we will see below, these tasks are often called principles in the coordination Regulation and case law on it.

Article 48 itself mentions the general objective of coordination, i.e. the promotion of free movement. In the case law this is not mentioned as a principle, but it is used as an objective that is relevant to the interpretation of coordination rules. Still, we will discuss this objective also here, as the principle – to be discussed below – that no benefit rights must be lost as a result of making use of free movement is closely connected to this objective.

---

[2] Case 110/79 [1980] ECR 1445.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

These objectives and tasks are often interpreted as principles. In addition also the principle of good cooperation of benefit administrations is often mentioned as a principle of coordination law.

From this list we derive the following list of tasks and objectives, which will be discussed below in order to investigate whether they are principles or not:

1. promotion of free movement of persons;
2. prohibition of discrimination on ground of nationality;
3. determination of the applicable legislation;
4. aggregation of periods of insurance, work or residence fulfilled in another Member State for satisfying the qualification period for benefit and calculating the level of benefit;
5. removal of territorial requirements for payment of benefit rights;
6. good cooperation of social security institutions in order to find solutions in administrative issues.

III.ii The Objective of Free Movement – The Principle that One Should not Lose Rights Following from National Law

Although the objective of free movement is an important objective, it is not called a principle, since it is not a basis from which legal rules are derived. Instead, it is an objective that benefit rules have to pursue. However, the Court derived an interesting principle from this objective, not codified in the Treaty or Regulation, which is that a worker must not lose benefit rights that the person has as a result of the application of national law. The Court itself calls this a principle, which is based on the presumption that if persons were to lose benefit rights by crossing the borders, they would not make use of the right to free movement.

The first time that the Court developed this concept was in the *Petroni* judgment.[3] In this judgment the Court decided that an article of the Regulation that was meant to reduce overlapping of old-age benefits was partially void. The aim of (what are now) Articles 45 to 48 TFEU would not be attained – the Court argued – if, as a consequence of the exercise of their right to freedom of movement, workers were to lose advantages in the field of social security guaranteed to them in any event by the laws of a single Member State.[4] A limitation on the overlapping of benefits which would lead to a diminution of the rights which the persons concerned already enjoyed in a Member State by virtue of the application of the national legislation alone is therefore incompatible with (what is now) Article 48 TFEU.

The principle has also played a role in later case law, which will be referred to in the following sections. In Section IV.i. an evaluation of the use of this principle is made.

---

[3] Case 24/75 [1975] ECR 1149.

[4] Although, as the Advocate General pointed out, the problem in *Petroni* was caused by a miscalculation of the benefits. Still, the Court's judgment was influential also in other cases, and this judgment was referred to as the *Petroni* principle.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

III.iii Prohibition of Discrimination on the Basis of Nationality

III.iii.a Non-discrimination as a principle

The non-discrimination principle is an essential coordination principle, since without such an equal treatment rule persons can still be excluded from a national scheme otherwise applicable. The rule on equal treatment is laid down in Article 45 TFEU and Article 4 of the coordination Regulation.

Before the first coordination Regulation (Regulation 3) came into force, equal treatment in coordination instruments was often based on the reciprocity principle, i.e. that a State only treats nationals of a particular country in the same way if that country also treats the nationals of the former State in the same way.[5] This reciprocity principle does not underlie EU coordination law; after all, Member States are all fully bound by all the provisions of the Regulation, so in that sense reciprocity underlies the system, but it is not a condition. Also in other EU coordination instruments that apply to countries not bound by EU law, reciprocity is not asked for, e.g. Decision 3/80 on the coordination of social security for Turkish nationals. So equal treatment is an important, unconditional principle.

Article 45 TFEU allows only the exceptions mentioned in the Treaty (public health, public security, public order). In such wording the article comes very close to a principle. In the case law of the Court on the coordination Regulation, Article 45 has an important function and rules of the regulation have to be interpreted in the light of this, as we saw already in the *Pinna* case.

III.iii.b Discussions of the principle

Also in political discussions – outside the strict legal framework – nowadays the principle of non-discrimination on ground of nationality has in general become accepted, although there are some areas where there are disputes. One dispute concerns the obligation of the Treaty to treat foreign workers entering a country equally with nationals already in the first stage of their stay. This is seen as particularly problematic in relation to the rules on aggregation of periods in order to qualify for benefit: is it right that also persons who have worked a very short time in a country can aggregate the periods completed abroad to qualify for, for instance, unemployment benefit? Sometimes it is argued that this should for a certain period not be the case.

However, equal treatment and aggregation of periods are fundamental to free movement. Without such equal treatment, persons may be without protection if a risk materialises shortly after crossing the border, and exactly for the purpose to give them protection also in the early stages of a stay abroad, coordination rules have been made. In this respect equal treatment of workers differs from equal treatment of persons, where in the case law of the Court (e.g. *Förster* judgment),[6] for the full application of

[5] This condition can still be found in ILO Convention 118, Article 3: 'Each Member for which this Convention is in force shall grant within its territory to the nationals of any other Member for which the Convention is in force equality of treatment under its legislation with its own nationals, both as regards coverage and as regards the right to benefits, in respect of every branch of social security for which it has accepted the obligations of the Convention.'

[6] Case C-158/07 [2008] ECR I-08507.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

Article 18 TFEU (the general provision on discrimination on ground of nationality of the Treaty), citizens need a certain degree of integration in the host State, which often means that they have resided in that country for some time. For economically active persons this integration is already realised by their working in that country, so there is no condition on residence.

A second issue where the principle of non-discrimination is politically sensitive concerns its use by persons whose lack of a permanent right to residence affects their right to social security: can they invoke the protection by the non-discrimination rule? This was the issue in, for instance, the *Sürül*[7] and *Martínez Sala*[8] cases.

In the latter judgment the Court ruled that for a Member State to require from a national of another Member State a residence document, when its own nationals are not required to produce any document of that kind, amounts to unequal treatment.[9] The judgment concerned interpretation of (what is now) Article 18 TFEU, but this interpretation of the non-discrimination rule in relation to residence requirements is also relevant to the interpretation of provisions of the coordination Regulation.

In the *Sürül* case the Court had to answer the question of whether the equal treatment provision of Decision 3/80 must be interpreted as precluding the application of legislation of a Member State which requires that a Turkish national, who has been authorised to reside in its territory and is lawfully resident there, hold a certain type of residence document in order to receive family allowances. The answer was in the affirmative, as the Turkish national in this situation has to be treated in the same way as nationals of the host Member State. The requirement to hold a particular type of residence document does not apply for nationals of Germany and the condition applicable to Turkish nationals was therefore discriminatory incompatible with Decision 3/80. Thus the Court does not discuss as such the requirements on the legality of residence one must have in order to be entitled to benefit, but limits itself to comparing the condition for nationals and foreigners.

III.iii.c Indirect discrimination and assimilation of facts and events

The Court interprets the non-discrimination rule of the Regulation also as prohibiting indirect discrimination. Indirect discrimination on the ground of nationality concerns a practice or rule which, although not mentioning nationality, leads to disadvantageous effects for foreigners. An obvious example is a benefit condition that requires residence in a State in order to be entitled to benefit. This condition will affect more foreigners than nationals and is therefore considered indirectly discriminating unless there is an objective justification for the condition.

'Obvious' examples that raise the suspicion of indirect discrimination have, in the course of time, been addressed by specific coordination rules. For instance the residence condition that raises the suspicion of indirect discrimination is now addressed by the provision that waives residence conditions (Article 7 of the coordination Regulation). In this case the non-discrimination rule does not have to be applied any more. The advantage of the more specific rules is that it has not to be investigated

[7] Case 262/96 [1999] ECR I-2685.
[8] Case 85/96 [1998] ECR I-2691.
[9] Consideration 54 of the *Martínez Sala* judgment.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

whether there are objective justifications that take away the suspicion of indirect discrimination.

As we have seen in Section III.ii, the prohibition of indirect discrimination means that often facts abroad are assimilated with facts fulfilled in the competent State. For instance, if a rule requires that, in order to be eligible for family benefits, a person over 18 for whom family allowance is claimed has to register at the employment office in the competent State, this is indirect discrimination for persons living outside the State. It this is not allowed, registering in the State of residence suffices to satisfy this condition and facts are thus assimilated.

In the past, the Court did not always require assimilation of facts, as we saw in the *Coonan* judgment (Section II).[10] In order to realise a better solution for such cases a new principle was inserted into Regulation 883/2004, i.e. the assimilation of facts, events and benefit schemes. Consideration 9 of the Preamble of the Regulation explicitly calls this rule a principle: 'The Court of Justice has on several occasions given an opinion on the possibility of equal treatment of benefits, income and facts; this principle should be adopted explicitly and developed, while observing the substance and spirit of legal rulings.'

Thus the case law of the Court was interpreted as having developed a new principle, which is laid down as an explicit provision, Article 5. Equal treatment of facts or events is subject to the proviso in Article 5 'unless provided otherwise in the Regulation'.

Consideration 12 of the Preamble reads that in the light of proportionality, care should be taken to ensure that the principle of assimilation of facts or events does not lead to objectively unjustified results or to the overlapping of benefits of the same kind for the same period. This proviso itself is not laid down in Article 5, but – as we may assume – for all parts of the Regulation it is investigated whether such risks exist and then a deviation is made. A major area where there is no assimilation yet is in the definition of disability (unless this is mentioned in the annex). Strictly speaking this is not covered by the proviso to the principle, but apparently Member States want to keep their powers in this, since the concept of disability is a core element of their social protection policy.

III.iv Determining the Legislation Applicable

III.iv.a Introduction

The rules for determining the legislation applicable overrule principles of national legislation that define the conflict rules. So here we see a conflict of principles, those of coordination law, and those of national systems; EU coordination law has priority.

The national principles describe how a country has organised its social security system. A country can insure, for instance, all its nationals (nationality principle). Or it can cover all its residents, in which case the national system is based on the territoriality principle. These principles are used to define who are in and who are outside the system.

Since the criteria of the national systems may exclude mobile persons, or may include them in more than one system at the same time, relying on national conflict

[10] Case 110/79 [1980] ECR 1445.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

rules would make it difficult to make use of the freedom of movement. Determining which legislation is applicable is therefore an important element of coordination of social security, even though it is not mentioned as such in the objectives listed in Article 48 TFEU. One important reason why these rules are so relevant is that they ensure that persons (and employers, if the persons are workers) have to pay contributions in one country only. The other is that they make clear in which country a person is entitled to benefit.

III.iv.b The principle of exclusive effect

The rules for determining the legislation applicable are relevant to determine which of the legislation involved actually applies in a particular situation. A principle *not* used in coordination of social security (although used as a conflict rule in private law) is that of choice for the parties (employee and employer, for instance), or the principle that the most favourable legislation applies.

The EU conflict rules for social security are based on the principle that only one piece of legislation is applicable at the same time (this is the principle of the exclusive effect) and which legislation applies is determined by the coordination Regulation. This was explicitly mentioned by the Court in the *Ten Holder* case.[11] An important effect of this interpretation was that this turned out unfavourable for the applicant, since it meant that she did not have a right to benefit under the scheme that was deemed non-applicable (although under the national (Dutch) rules alone she would have qualified for the benefit, since the benefit concerned was a residence scheme). At the same time she had exhausted her rights under the applicable legislation and there she was entitled to no benefits at all.

The Court considered that

> the provisions of Title II constitute a complete system of conflict rules the effect of which is to divest the legislature of each Member State of the power to determine the ambit and the conditions for the application of its national legislation so far as the persons who are subject thereto and the territory within which the provisions of national law take effect are concerned.

Thus the rules have exclusive effect and Ms Ten Holder was not entitled to the Dutch disability benefits.[12]

Another principle could have been at stake here: persons should not lose rights following from national legislation as a result of the application of the coordination Regulation. Exclusive effect is not, the Court considered, at variance with the Court's decisions on the principle that the Regulation cannot entail the loss of rights acquired exclusively under national legislation benefits as a result of the application of the coordination Regulation. The principle of not losing benefit rights does not apply to the rules for determining the legislation applicable, but to the rules of Community law on the overlapping of benefits provided for by different national legislative systems.

---

[11] Case 302/84 [1986] ECR 1821.

[12] Later the Regulation was amended to have different rules for persons not working any more.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

In later case law, the Court was less strict, as appeared from the *Bosmann* judgment.[13] In this case the claimant's children lived in Germany, while she worked in the Netherlands. She was not entitled to Dutch family benefits (the children were already too old; instead Dutch study grants would be payable for children of their age, but they did not qualify for these). Under German law she was entitled to family benefits.

The Court considered that Community law does not require the competent German authorities to grant Ms Bosmann the family benefits in question. However, it added, neither can the possibility of such a grant be excluded, because under the German legislation Ms Bosmann may be entitled to child benefit solely because of her residence in Germany, which is for the national court to determine. The Court referred to the legal basis of the Regulation – Article 42 EC (now Article 48 TFEU) – which aims to facilitate freedom of movement for workers and entails, in particular, that migrant workers must not lose their right to social security benefits or have the amount of those benefits reduced because they have exercised the right to freedom of movement conferred on them by the Treaty. In the light of those factors, the Court answered that the Member State of residence cannot be deprived of the right to grant child benefit to those residents within its territory.

The reasoning of the Court seems to differ in these cases and is difficult to reconcile. Still, one could say that the principle of exclusive effect holds in both cases, though in *Ten Holder* the argument for this was worded too strictly.

In the *Ten Holder* judgment the Court argued that the principle that one should not lose benefit rights as a result of the Regulation does not apply in the case of rules for determining the legislation applicable. In *Bosmann* it was argued that this principle also applies for these rules, but only if the legislation of a Member State allows payment of benefits.

The *Bosmann* approach is confirmed in the *Hudziński and Wawrzyniak* judgment.[14] The Court considered that it would both go beyond the objective of the coordination Regulation and exceed the purpose and scope of Article 48 TFEU to interpret that regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of that regulation. The coordination Regulation cannot therefore, except in the case of an express exception in conformity with those objectives, be applied in such a way as to deprive a migrant worker or those claiming under him of benefits granted solely by virtue of the legislation of a single Member State.

At the time of completing this chapter a preliminary ruling was given that develops this approach further.[15] In this case persons were working in minor employment in Germany, that did not insure them for *inter alia* old age and family benefits. They were residing in the Netherlands, where they would be insured under residence schemes if the rules for determining the legislation applicable do not prevent this. The Court ruled that the latter rules do not preclude a migrant worker who is subject to the social security scheme of the State of employment, who fulfils the substantive conditions for

[13] Case C-352/06 [2008] ECR I-3827.
[14] Cases C-611/10 and C-612/10, EU:C:2012:339.
[15] Case 382/13, *Franzen*, EU:C:2015:261.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

granting such benefits under the legislation of his State of residence and whose situation does not give rise to an overlapping of the same form of family benefits in relation to the same period, from receiving family benefits or an old-age pension from the latter State. The Court also remarked that although the Dutch legislation precludes, by referring to the coordination regulation, migrant workers from being covered by the old-age pension insurance scheme of that State, the referring court clarifies that, if the coordination regulation does not prevent coverage by the Dutch scheme, then it is for the referring court to disregard the exclusion clause and to apply the hardship clause provided for in the Dutch legislation in order to remedy any unacceptable unfairness which might arise from the insurance obligation or the exclusion therefrom.

III.iv.c Exceptions to the principle of exclusive effect

Although the exclusive effect of the rules of Title II is mentioned as a principle, the Court did not declare rules of the Regulation void that allowed simultaneous application of legislation of two countries. Under Regulation 1408/71 some countries with an extensive social security system for the self-employed asked for, and obtained, an exception to this rule; this was laid down in Article 14(c)(a) of the said Regulation, which provided that in the cases mentioned in Annex VII, a person was subject to the legislation of the Member State where s/he worked as an employed person and to the legislation of the Member State where s/he worked as self-employed. This rule was therefore an exception to the principle of exclusive effect. As a result of this rule the State where the person worked as self-employed applied its legislation on the self-employed activities performed in its territory; and the other State applied its legislation on the activities as an employed person. The rationale for this serious infringement of the exclusive effect of the rules for determining the legislation applicable was that otherwise persons might evade the contributions payable for self-employed activities by adopting a job as an employed person in a neighbouring country which did not have a system for the self-employed. As a result, the social security system of the latter country would levy contributions on the income for activities as an employed person only; the income for activities as self-employed would be unaffected. This effect was to be prevented by this rule.

In the *Hervein and Lorthiois* judgment[16] the Court decided that Article 14(c)(b) of Regulation 1408/71 was valid in view of Articles 39 and 42 EC (at present Articles 45 and 48 TFEU). Relevant was, the Court considered, whether the simultaneous application hinders free movement. It decided that this was not (seriously) the case. So the Court followed a case-by-case examination, and did not enforce a general principle of exclusive effect.

In Regulation 883/2004 the principle of exclusive effect was reinforced by not allowing simultaneous application of rules for employed and self-employed persons. Also the rule of Regulation 1408/71 that allowed simultaneous application of legislation if one of these pieces of legislation covered civil servants was not maintained in the new Regulation.

---

[16] Cases C-393/99 and C-394/99 [2002] ECR I-2829.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

III.iv.d Principles for selecting the applicable legislation

The country-of-employment principle After this discussion of the exclusive effect, it is important to discuss the principle that determines *which* legislation applies. As in the predecessors of the present coordination Regulation, the *lex loci laboris* (State of employment) is the main principle. The rationale for this principle fits very well with the objectives of the EU, even though it sometimes has problematic effects for some national systems.[17] First of all, the principle entails that all persons employed by a particular employer are subject to the same contribution and benefit system. Consequently, employers are not able to employ foreign workers on cheaper conditions than national employees. Another approach, which would allow the employer to pay lower contributions for foreign workers and/or allow him to pay these contributions to the institution in the sending State, would mean that these foreign workers were cheaper and would replace national workers. This would put pressure on the national system to lower its contributions and thus also its benefits. All in all, the country-of-residence system would lead to a general deterioration of the benefit system of the receiving country. This would be inconsistent with the Treaty, which requires promoting social progress.[18] Moreover, the non-discrimination principle, laid down in Article 45 TFEU, would make it extremely difficult to adopt a different approach if this were to lead to obstacles to free movement. In some cases Article 45 was successfully invoked where a benefit coordinated on the basis of the State-of-residence principle (see below under 'Special Non-contributory benefits and social assistance', the *Hendrix* judgment[19]) meant an obstacle to free movement.

Since the personal scope of the Regulation has been extended to all nationals subject to a social security system, and is thus no longer restricted to economically active persons, the *lex loci laboris* principle has become less obvious than before. This is more true now that more and more benefits are introduced for persons not (any longer) in work and the Regulation had to give special rules for categories of non-active persons which are based on the State-of-residence principle. These include persons who are not working, persons not working receiving particular types of long-term benefits, and categories of the unemployed.

When the proposals for a new coordination Regulation to replace Regulation 1408/71 were introduced, some authors proposed to introduce the State-of-residence principle, in particular for residence schemes and schemes for the protection of the self-employed.[20] These proposals were not followed. The main principle is therefore still

---

[17] *See*, for an overview of proposals for an alternative, Frans Pennings, 'Co-ordination of Social Security on the Basis of the State-of-employment Principle: Time for an Alternative?' (2005) 42(1) *Common Market Law Review* 67–89.

[18] For the objectives of the Treaty, see Article 3.

[19] Case C-287/05 [2007] ECR I-6909.

[20] Anna Christensen and Mattias Malmstedt, '*Lex Loci Laboris* versus *Lex Loci Domicilii* – An Inquiry into the Normative Foundations of European Social Security Law' [2000] *European Journal of Social Security* 69; D Pieters (ed), *The Co-ordination of Social Security at Work* (Acco 1999); D Pieters, 'An Overview of Alternative Solutions for Overcoming the Problematic Issues of Co-ordination', in Ministry of Labour and Social Security and European Commission

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

the State-of-employment principle since this is necessary to avoid undesired competition on contributions.[21]

Exceptions to the State-of-employment principle There are some exceptions to this State-of-employment principle: for the so-called solidarity benefits, unemployment benefits and posting rules. Also for persons (no longer) working basically the country of residence applies, but that is no real exception, since these persons do not work any more. Still, they could, as under the early rules of the regulation, have remained subject to the previous system under which they had been covered, which could have positive effects, in the sense of higher benefits, but also negative effects (such as in the *Ten Holder* situation) for them. In order to make the State of residence responsible the coordination Regulation now determines the legislation of the residence State applicable.

Special non-contributory benefits and social assistance The coordination Regulation was amended in order to include rules on special non-contributory benefits[22] after the Court had ruled that these benefits – for instance minimum benefits for the old aged – are within the scope of the Regulation and not excluded as being public assistance benefits (*Frilli* case[23]). As a result of the latter judgment these benefits were to be paid regardless of the nationality of the worker and the benefit became exportable. In order to avoid the latter effect, the coordination Regulation was amended in order to restrict export. Consequently, the special non-contributory benefits are not exportable and the legislation of the State of residence determines whether a person receives these benefits or not (currently Article 70 of Regulation 883/2004).

As already mentioned above, also these specific rules are to be interpreted in the light of Article 45 TFEU. This became clear in the *Hendrix* case,[24] in which, as a result of the loss of his non-contributory Wajong benefit (the disability benefit for persons disabled before the age of 18), Mr Hendrix lost his job.[25] The Court ruled that the provisions of the coordination Regulation enacted to give effect to Article 48 TFEU must be interpreted in the light of the objective of that article: to contribute to the establishment of the greatest possible freedom of movement for migrant workers. The application of the benefit condition must not entail an infringement of the rights which a person in the situation of Mr Hendrix derives from freedom of movement for workers which goes beyond what is required to achieve the legitimate objective pursued by the national legislation.

(ed), *The Free Movement of the Self-Employed within the European Union and the Co-ordination of National Social Security Systems* (European Commission 2001) 127.

[21] Paul Schoukens and Danny Pieters: 'The Rules within Regulation 883/2004 for Determining the Applicable Member State Legislation' [2009] *European Journal of Social Security* 81–118.

[22] By Regulation 1247/92 [1992] *OJ L* 136 1–6.

[23] Case 1/72 [1972] ECR 457.

[24] Case C-287/05 [2007] ECR I-6909.

[25] Entitlement to Wajong benefit meant that the employer was relieved from the obligation to pay the minimum wage; now this advantage was lost, his employer considered him too expensive.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

Unemployment benefits for wholly unemployed frontier workers The second category of special rules is that for wholly unemployed frontier workers. Article 65(5)(a) of the coordination Regulation concerns the right to unemployment benefit in this case: the person concerned can claim benefit in accordance with the legislation of the State of residence, as if s/he had been subject to that legislation during his or her last activity as an employed or self-employed person. Benefits are provided by and at the expense of the institution of the place of residence. Thus wholly unemployed frontier workers are paid unemployment benefits in the State of residence. The Court accepted this deviation from the State-of-employment principle in the *Mouthaan*[26] and *Miethe*[27] judgments. In his conclusion to the *Mouthaan* case, the Advocate General mentioned the *Petroni* principle – i.e. that one should not lose acquired rights – as 'a question that obviously suggests itself', but he did not discuss this any further. Since the national, referring judge did not raise the question on compatibility with the *Petroni* principle, the Court of Justice did not discuss this issue either. Also in the *Miethe* judgment the Court did not discuss the problem that the principle that persons must not lose their right to benefit following from the application of national law may be infringed. One reason may be that in the case of unemployment benefits the Court is more cautious about imposing strict obligations on Member States;[28] the other may be that strictly speaking the frontier workers are often not entitled to unemployment benefits on the basis of national law alone, since unemployment benefits are not exportable. Therefore it cannot be said that they lose benefit rights if they do not live in the State that is due to pay these benefits, even it can be held that they are indirectly discriminated against.

Posting rules A third category of exceptions to the State-of-employment principle is that of posting rules, although these are not based on the State-of-residence principle, but refer to the country where the person was insured before. These involve that a person who has been insured and who temporarily works in another Member State remains covered under the first legislation. The posting rules in fact constitute a convincing example that the State-of-employment principle is necessary: the posting rules show that differences between social security systems make it attractive to post persons from countries with lower contributions to countries with higher contributions and thus to benefit from the contribution differential.

This raises also the question whether the posting rules are based on a proper principle. Of course, applying the State-of-employment principle immediately to everyone as soon as they cross the border would seriously hinder free movement, so the principle that one remains covered by the system where one was previously insured is essential for a certain period (maximum 24 months). But should this also mean that the possibility to benefit from differences in contributions has such a large impact? In other words, should not the exception to the State-of-employment principle be less broad? A possibility is that the State-of-employment principle is enforced to the extent that after three months of posting the contributions have to be paid at the level of the country of

[26] Case 39/76 [1976] ECR 1901.
[27] Case 1/85 [1986] ECR 1837.
[28] See also the *Testa* judgment (Cases 41, 121 and 796/79 [1980] ECR 1979) and Case C-406/04 *De Cuyper* [2006] ECR I-6947.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

employment if these are higher than in the country where the person is insured (but still in the country of origin). One could of course also change the maximum period of posting to – let us say – three months, but the advantage of the first proposal is that it does not affect situations where the contributions in the country of employment are not lower and it also has advantages for persons who want to remain insured in the system in which they have already been acquiring rights (e.g. a pension scheme), since this creates fewer obstacles. The proposal, however, takes away improper advantages in terms of contributions, that lead to distortion of competition.

A totally different approach to the present system of determining the legislation applicable An original proposal relevant to the coordination system is that of the 13th State, proposed by Pieters.[29] The idea is that coordination rules have become very complicated – which is certainly true. Therefore he proposed a separate system (currently, now the EU has 28 Member States, we would call it the 29th State system): persons crossing borders can join and remain in that system wherever they work. The proposal makes sense as it solves several of the complications of the present coordination system. However, that is true only if it is attractive to join (both in terms of not being too expensive and in guaranteeing adequate protection) and if indeed it leads to a massive use, so that in cross-border situations few people remain in their original system. Otherwise there is an extra system to involve in coordination. If it is successful it amounts to a form of harmonisation, in any case for migrants who opted for this.

It is, however, highly utopian that this system will be made, and has become even more difficult with the current number of Member States.

A gradual harmonisation of the present systems by the effect of the coordination rules seems to have better prospect of solving the problematic aspects of current coordination.

III.iv.e Conclusion

Even though the coordination Regulation does not solely concern economically active persons, the determination of the legislation is still on the basis of the State-of-employment principle, in any case since the differences between contribution levels are still so large that it is interesting for companies to make use of these differences. Such use can lead to social dumping and negative effects of the nationals of a Member State.

The exceptions to the State-of-employment principle do not systematically relate to the nature of the benefits, as was proposed by some authors (see note 20). The exceptions have more to do with policy considerations of Member States that do not want to export their solidarity benefits outside their own territory. Since persons from other Member States residing in a country cannot be refused these benefits on the basis that facts are lying outside the country, the link between solidarity benefits and territory has positive effects for this group.

---

[29] Danny Pieters, *Sociale Zekerheid na 1992: één over twaalf* (Tilburg University Press 1992); D Pieters and S Vansteenkiste, *The Thirteenth State. Towards a European Community Social Insurance Scheme for Intra-Community Migrants* (Acco 1993).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

Currently the major issue on which one can dispute the reasonableness of the State-of-employment principle concerns family allowances, of which the level, when dependent on the country of employment, may be higher, but also lower, than that of the country where the children live. However, since most children will live with one parent in the country of residence, and increasingly that parent will be entitled to these benefits (either since they are working or since the family benefits scheme is a residence-based scheme, they will be entitled to that benefit (supplemented if that of the other country is higher), so the problem of a too low benefit is gradually disappearing.

III.v Aggregation of Periods

Some national schemes make the right to certain types of benefits subject to the condition that the applicant has completed periods of residence, contributions or work in that country. When periods completed in other Member States do not count for the fulfilment of such conditions, cross-border movement leads to serious problems. Without further rules, a worker may not satisfy the conditions for benefit entitlement and will not receive benefit.

It may also happen that, although an employee succeeds in satisfying the benefit conditions, periods completed in a foreign country do not count in the calculation of the amount of benefit. This worker receives a lower benefit than s/he would if these periods were aggregated. Therefore, an important objective of coordination is to ensure that migrant workers who have been insured in more than one State do not suffer the disadvantages caused by breaks in their career as a result of cross-border movement. It is important that the periods completed in a foreign country and those completed under the coordination Regulation of the State where benefit is claimed are aggregated.

This principle is not controversial, since it is important to free movement. However, as we saw above, sometimes its (possible) application in case of unemployment benefits is disputed, although unsuccessfully.

Under Regulation 1408/71 the aggregation rules were interpreted by the Court as prohibiting exclusion of persons from benefit on the ground that they were already ill before they started working in the competent State. The beginning of the insurance is also extended for this purpose by taking the aggregation rules into account (*Klaus* judgment).[30] Under the present Regulation the assimilation rules would have the same outcome.[31]

III.vi Payment of Benefit

Payment of benefits also in another Member State is one of the tasks for coordination mentioned in Article 48 TFEU. Consideration 37 of the Preamble to Regulation 883/2004 provides that, as the Court of Justice has repeatedly stated, provisions which derogate from the principle of the exportability of social security benefits must be

[30] Case 482/93 [1995] ECR I-3551.
[31] See also Case 481/93 *Moscato* [1995] ECR I-3525.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

interpreted strictly. This means that they can apply only to benefits which satisfy the specified conditions.

From this follows that exceptions to the export principle have to be interpreted narrowly. For this reason the Court was also critical of benefits listed as special non-contributory benefits for the purpose of the Regulation, since these do not have to be exported. The Court decided that this exception can apply only to benefits which are both special and non-contributory.[32]

A major exception to the export of benefit lies in the area of unemployment benefits. Whereas the basis for the non-export of special non-contributory benefits lies in the solidarity character of this type of benefit – it provides for a minimum, often means-tested, income for persons who would otherwise live in poverty, whereas the benefit is paid out of public funds – for unemployment benefits the rationale for the limited export of benefits is different. The rationale is that there is a close link between the labour market of the country that pays the benefit and the benefit. On the one hand this country wants to ensure that a person is really seeking work, since otherwise the country will pay more benefits than necessary. On the other hand it is also assumed that a person has the best chances on the labour market in the country where s/he lives.

Still there is a limited period for export of benefits. Basically it is three months, but Member States can award a longer period, of up to six months. One can wonder whether this limited period is long enough, given the existence now of a pan-European labour market, as realised by the fundamental provisions of the Treaty (inter alia Article 45 TFEU). On the other hand, one can also argue that looking for a job in another country only in few cases requires actually being there, although in some situations it is still relevant, where vacancies are not posted on the internet, or where the actual presence of the candidate is decisive for information on job openings. This is indeed an area for further research, mainly on an empirical basis: how do persons find work in another country?

Another issue is what the consequences are for a person who went to another Member State to look for work, but does not return within the period allowed for job search (generally three months). The Regulation provided that in such a case a person loses all remaining unemployment benefit rights. One might have expected that the Court of Justice would not have accepted this provision on grounds of the *Petroni* principle. This issue arose in the *Testa* case.[33] The Court considered that the export rule of the then Regulation, Article 69 of Regulation 1408/71, was not simply a measure to coordinate national law on social security, but established an independent body of rules in favour of workers claiming the benefit, which constitute an exception to national legal rules and which must be interpreted uniformly in all the Member States. The migrant worker has an advantage as Article 69 frees him for a period of three months of the duty to keep himself available to the employment services of the competent State. As part of a special system of rules which gives rights to workers which they would not otherwise have, Article 69(2) cannot therefore be equated with the provisions held invalid by the Court in the *Petroni* judgment.

---

[32] *See Leclere* judgment, Case 43/99 [2001] ECR I-4265.

[33] Cases 41/79, 121/79 and 796/79 [1980] ECR 1979.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

III.vii The Principle of Cooperation of Benefit Administrations

Article 76 of Regulation 883/2004 provides that the institutions, in accordance with the principle of good administration, shall respond to all queries within a reasonable period of time and shall in this connection provide the persons concerned with any information required for exercising the rights conferred on them by this Regulation. Thus the Regulation itself mentions the principle of good cooperation. It is, however, not much elaborated. Of course, the regulation and the implementing regulation give many detailed and technical rules on the cooperation of institutions, but for the individual there is not much help provided in the case of an institution that does not cooperate or provides the wrong information or has insufficient knowledge of the coordination Regulation.

The principle is also related to the principle laid down in the Treaty of loyal cooperation between the competent authorities of the Member States. This requires that they apply all available means in order to realise the aim of Article 45 TFEU. This has some value where the Court finds that a particular situation leads to an undesirable outcome, but cannot find a basis in EU law to solve this. An example is the *Van Munster* judgment[34] in which the Court, though refraining from imposing an interpretation that would result in a particular outcome, forced Member States to cooperate to find a particular solution to a problem for a particular migrant worker. This worker received both a Belgian and a Dutch old-age pension, but when his wife retired his pension was reduced due to differences between the legislation of the Netherlands and Belgium. The Court considered that if a national statutory scheme is applied to a migrant worker in the same way as to employees who remained in the same country, this can have unexpected consequences. These are hard to reconcile with the aim of (what are now) Articles 45 to 48 TFEU. As regards freedom of movement for workers, Article 48 leaves in place differences between the Member States' social security systems and, consequently, in the rights of persons working in the Member States. In the present case the provision of the Belgian legislation at issue applies without distinction both to Belgian nationals and to nationals of the other Member States. Consequently, it cannot be regarded as constituting, in itself, a barrier to freedom of movement for workers. However, while it is true that the coordination provision of the Treaty leaves in place differences between the Member States' social security systems and hence in the rights of persons working in the Member States, it is not, however, in dispute that the aim of (what are now) Articles 45 to 48 TFEU would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State. In the present case, it appears that application of national legislation to a migrant worker in the same way as to a non-migrant worker gives rise to unforeseen consequences, hardly compatible with the aim of the Treaty and attributable to the very fact that the migrant worker's pension entitlements are governed by two different bodies of legislation. Where such a difference in legislation exists, the principle of cooperation in good faith laid down in Article 5 of the EEC Treaty (now in essence laid down in Article 4(3)

[34] Case 165/91 [1994] ECR I-4661.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

TEU) requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 45 TFEU.

In the *Leyman* judgment this principle was also applied where a person encounters an obstacle to free movement due to differences between national systems.[35] This judgment concerns a person who was first insured in Belgium and then started to work in Luxembourg and was insured in that country. According to the national Luxembourg rules, she was immediately (so without a waiting period) awarded a Luxembourg invalidity benefit, since her health situation was such that she was eligible for that benefit. Thus she was not entitled to a full sickness benefit from Luxembourg. The disability benefit was, in accordance with the coordination Regulation, related to the duration of her insurance in Luxembourg, which was short in her case, and therefore also her disability benefit was small. She was also entitled to a Belgian disability benefit, but this was paid only after a waiting period of one year. Normally persons get sickness benefit during the waiting period, but since she was not covered by Belgian law (due to the conflict rules), she was not paid Belgian sickness benefit. Therefore she had to rely on the small Luxembourg disability pension during the waiting period.

The Court considered that, as regards freedom of movement for workers, (what is now) Article 48 TFEU leaves in place differences between the Member States' social security systems. It follows that substantive and procedural differences between the social security systems of individual Member States are unaffected by Article 48. It is not, however, in dispute that the aim of Article 45 TFEU would not be met if, through exercising their right to freedom of movement, migrant workers were to lose social security advantages guaranteed to them by the laws of a Member State, as this would negatively affect their right to freedom of movement. This would constitute an obstacle to that freedom. Workers who are in a situation such as that of Ms Leyman have paid social contributions on which there is no return so far as the first year of incapacity is concerned.[36] Where such a difference in legislation exists, the principle of cooperation in good faith, the Court ruled, requires the competent authorities in the Member States to use all the means at their disposal to achieve the aim of Article 45 TFEU.

IV. CONCLUSIONS ON THE ROLE OF PRINCIPLES IN COORDINATION LAW

IV.i Principles as Norms with which Positive Rules Have to be Consistent

In law the term 'principle' is generally used in the sense that it is a norm representing a certain value, such as that in a dispute both parties have to be heard. This is to be elaborated in law. In many legal systems courts can confront a particular legal rule, even if part of an Act of Parliament, with a principle and decide whether it is consistent with this principle or not.

---

[35] Case C-3/08 [2009] ECR I-9085.

[36] This was also decided in Cases C-393/99 and C-394/99 *Hervein and Others* [2002] ECR I-2829.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

One example of the use of the term 'principle' in this sense is the non-discrimination rule of Article 45 TFEU. Since this rule is explicitly laid down in the Treaty in this case the difference between principle and rule is very small; or, in other words, there is no need to call this a principle.

A more clear example of the use of the term 'principle' in this sense in coordination law is that coordination rules must not deprive mobile workers from rights they have on the basis of national law alone. This principle was established by the Court itself; it is not codified in EU law.

The Court has interpreted this principle differently for old-age benefits, family benefits and the rules for determining the legislation applicable, but still, as a result of the principle, it has declared coordination rules void or has interpreted these rules as requiring differential payments. Only in case of unemployment benefits the Court did not use the principle to compensate the negative effects of cross-border movement. Apparently, the Court considers payment of this benefit according to the coordination rules outside the territory of a State already generous enough, since it goes beyond the national rules of the Member States. Therefore it did not want to extend the coordination rules in order to give more generous benefits by applying the *Petroni* principle.

The *Van Munster* and *Leyman* judgments show that this principle also has an impact where there is no clear case of unequal treatment and coordination rules are correctly applied, but still there is a negative impact on the use of free movement. In this case the Court does not declare provisions of the Regulation void, but requires Member States in loyal cooperation to find a solution. Although it is difficult to assess the impact of such request, it surely has an effect in those cases similar to that in the judgment.

The *Petroni* principle has thus been part of the Court's case law through time and has been given a broader interpretation through time, but it is not a concept that has been very well elaborated yet in the case law nor does its application always have the same effects nor even are the effects fully clear, since sometimes the solution for the problem found is left to the Member States.

IV.ii The Other Use of the Term 'Principle' in Coordination Law

The term 'principle' is frequently used in coordination law in a way other than as a value by which positive law has to abide. In these cases the Court refers to articles of the coordination Regulation and identifies a common approach underlying these rules that it deems relevant for the interpretation of these rules. Still, the Court does not go so far that it does not accept deviations from this principle in the rules of the Regulation, unless they are inconsistent with the Treaty (in particular the non-discrimination rule). For instance, the rules for determining the legislation applicable entail the principle of exclusive effect: not more than the legislation of one Member State should be applicable at the same time. The Court is, however, cautious to decide that a particular rule of the Regulation is inconsistent with such principle and therefore not binding, as we saw in Section III.iv.b.

The reason why the Court uses the term 'principle' so often is probably that it can serve as an argument for a particular interpretation of the coordination rules. If a literal reading of a provision of the regulation does not give an answer to the question of a

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

national court, referring to the principle underlying it can lead to a particular interpretation. Thus the term 'principle' is often used to give an interpretation of a coordination rule or for explaining a particular approach in the coordination Regulation.

IV.iii What is Special in EU Coordination Law?

A typical characteristic is that EU coordination law is an integral part of the legal order of an international organisation that its members cannot escape. It has a legal basis in the Treaty and is subject to interpretation by a supranational court. This means that principles could be developed and imposed that are much more difficult to enforce for other coordination instruments, e.g. bilateral treaties, and in other international organisations (ILO, Council of Europe). Examples are, in particular, the principle of loyal cooperation and the principle of exclusive effect of the rules for determining the legislation applicable. The first principle requires cooperation even to supplement existing rules, and this can be done only if the organisation has clear common objectives and obligations. The second principle basically means that a particular piece of legislation is determined as being applicable; as a result the countries whose legislation is not applicable miss payment of contributions in that situation. This is sometimes hard to enforce on countries if there is no supranational court and binding system, but this effect is realised within the special legal order of the EU.

Closely connected with this specific characteristic of EU coordination is that coordination serves to promote the fundamental freedom to move to another Member State. This means that coordination rules are interpreted in view of a particular objective, and that has been essential to their interpretation. Such interpretation is not possible within other international organisations.

The case law of the Court is a clear motor behind the development of coordination law, and one of the reasons is that it has interpreted the rules in line with the principles behind them. As a result the interpretations gained more authority as referring to the underlying principles made the arguments stronger.

The use of the term 'principles' also shows that coordination law is a rather dynamic area and that there is a constant need to seek interpretation of the Regulation and legislation in order to remove barriers to free movement.. The use of the term 'principles' is therefore useful both for the development of coordination law and for giving grounds for a particular interpretation.

Even though, as we have seen, the term 'principle' has been used in different ways, both uses are helpful to understand EU coordination, and, since the principles enable us to rise above the sometimes complicated rules and exceptions, they can also show us what is special in EU coordination law.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

V. THE FUTURE OF EU COORDINATION LAW

V.i Limitations of EU Coordination Law

Even though coordination is inescapable for the Member States, or rather exactly *because* coordination is inescapable for the Member States, it is difficult to extend the scope of the coordination rules. There have been important developments, e.g. the extension of the personal scope of the coordination Regulation from economically active persons to all EU nationals, but other extensions to solve current problems for free movement remain difficult.

One such problem is the limited material scope of the Regulation, i.e. that the Regulation is limited to the types of benefits mentioned in Article 3 and to statutory benefits.

Instruments other than the coordination Regulation may be applicable to benefits outside the scope of the latter regulation, for instance Regulation 492/2011, but these are mainly limited to an equal treatment rule. In one case, aggregation rules were derived directly from the Treaty (Article 48) and applied to benefits that were at the time outside the scope of the coordination Regulation, but that was an exceptional decision.[37]

Remarkable also is the exclusion of social assistance from the coordination system. A general reaction to proposals to include public assistance in the Regulation is that 'we' do not want benefit tourism, i.e. people coming to a country just to receive benefit. However, there are developments that show that a more sophisticated approach is also possible. After all, the case law of the Court of Justice has shown that workers have access to public assistance in the country of work on the basis of Article 7 of Regulation 492/2011 (*Hoeckx* judgment).[38] In addition, non-active persons can claim public assistance on the basis of Articles 18 and 21 TFEU if this is refused on the ground of nationality (*Grzelczyk* judgment).[39] In addition Article 24 of Directive 2004/38 allows Member States to exclude equal treatment for social assistance for certain periods as mentioned in the directive. If persons claim benefit before this period has elapsed they can be expelled if they constitute an unreasonable burden for the State concerned.[40]

These rules developed in the case law constitute a rudimentary form of coordination, which gives protection to Member States to the extent that they constitute serious barriers to benefit tourism and also give some rights to migrants. However, a comprehensive approach is lacking and this sometimes leads to legal uncertainty. It

---

[37] Case 443/93 *Vougioukas* [1995] ECR I-4033. In the *Casteels* judgment (Case C-379/09 [2011] ECR I-01379) the Court did not accept direct applicability of Article 48 TFEU. The difference might be that in *Vougioukas* the employer was a public organisation and in *Casteels* it was a private company.

[38] Case 249/83 [1985] ECR 982.

[39] Case 184/99 *Grzelczyk* [2001] ECR I-6193.

[40] According to the *Dano* judgment (Case C-333/13, nyr) even special non-contributory benefits can be refused if persons do not have sufficient resources for living in the host State.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

would be better to include social assistance in the coordination Regulation and then define which rules are applicable to this type of benefit.

I would also encourage a reconsideration of the coordination of benefits based on solidarity. Currently, the limitation of the right to special non-contributory benefits to the State of residence is based on the solidarity principle, the Court argued (for instance in the *Hendrix* (see Section III.iv.d.) and *Kersbergen*[41] judgments). From this follows that a State does not have to bear the burden for these solidarity benefits for persons outside its territory, for persons who only recently entered the country. On the other hand, the Court decided in the *Brey* case that a person who lost the right to a special non-contributory benefit (to top up his pension) in Germany when he moved to Austria may lose his right to stay in that State when he claims this benefit. Apparently, requiring awarding this benefit could overburden the solidarity required in the host State. If one accepts that it would indeed not be expected that the host State pay these benefits to newcomers, then a reimbursement system between the previous State of residence and the new one might solve this problem.[42] For instance, the previous State that withdrew the non-contributory benefit has to pay half of the costs of the non-contributory benefit in the new State for the first five years of the stay.

V.ii Prospects

Coordination rules certainly have limits in their ability to protect migrant workers. Some of them are difficult to repair by coordination rules, such as the fact that some countries have special non-contributory benefits for a particular risk and others do not. But also the situation in *Leyman* was the result of differences between national schemes.

If these differences are not addressed, serious barriers to free movement will remain. A way out could be to investigate whether principles can be formulated for national legislation to provide certain benefits or services that diminish the differences between the systems and thus facilitate free movement. An example could be the principle that all Member States guarantee a minimum income to disabled persons and pensioners, so that benefits are supplemented to reach such minimum. It is up to the Member States to define such minimum, the criterion of the Committee of Social Rights, which sets the minimum level of 50 per cent of the median income.[43]

Another example is that of minor employment that is not insured: this could entail that persons working in such a country are not insured, whereas they are deprived of the coverage of the State of residence. Is it possible to give principles for national schemes that exclude such effects?

Article 153(2)(b) TFEU gives the powers to make such minimum provisions in the area of social security and social protection of workers. This could be a basis for making principles to be followed by national legislators. The term ‘principles’ leaves them sufficient room for making their own system, but in any case there is a safety net.

---

[41] Case C-154/05 *Kersbergen-Lap* [2006] ECR I-6249.

[42] Case 140/12 *Brey*, nyr.

[43] European Committee of Social Rights, *European Social Charter: Conclusions XVII-1* 276 (Council of Europe Publishing 2004), see also Chapter 8 of this volume.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

This interaction between coordination rules and national legislation is not so strange. For instance the Posting of workers directive (Directive 96/71) rules that (inter alia) the statutory minimum wage of the host State is applied to workers posted in that country.[44] As a result countries like the UK and Germany have introduced a statutory minimum wage in order to be able to require these payments for the posted workers and therefore also to put a floor in the labour market, thus protecting it against too low foreign wages.

Such approach also fits closely with the arguments of the Court in the *Van Munster* and *Leyman* judgments: the obstacles in issue were not forbidden and cannot be solved by coordination law, but they constitute an obstacle to free movement that is difficult to accept. This means that additional measures are needed. This is an interesting area for further research in coordination law: by which principles and rules applicable to national legislation is it possible to remove obstacles to free movement that cannot be taken away by coordination law?

BIBLIOGRAPHY

Christensen A. and M. Malmstedt (2000), '*Lex Loci Laboris* versus *Lex Loci Domicilii* – An Inquiry into the Normative Foundations of European Social Security Law', *European Journal of Social Security* 69 ff.

European Committee of Social Rights (2004), *European Social Charter: Conclusions XVII-1* 276, Strasbourg: Council of Europe Publishing.

Houwerzijl, M. (2005), *De detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG*, Deventer: Kluwer.

Pennings, F. (2005), 'Co-ordination of Social Security on the Basis of the State-of-employment Principle: Time for an Alternative?', *Common Market Law Review*, **42**(1) 67–89.

Pieters, D. (1992), *Sociale Zekerheid na 1992: één over twaalf*, Tilburg: Tilburg University Press.

Pieters, P. (ed.) (1999), *The Co-ordination of Social Security at Work*, Leuven: Acco.

Pieters, P. (2001), 'An Overview of Alternative Solutions for Overcoming the Problematic Issues of Co-ordination', in Ministry of Labour and Social Security and European Commission (ed), *The Free Movement of the Self-Employed within the European Union and the Co-ordination of National Social Security Systems*, Brussels: European Commission, 127 ff.

Pieters, D. and S. Vansteenkiste (1993), *The Thirteenth State. Towards a European Community Social Insurance Scheme for Intra-Community Migrants*, Leuven: Acco.

Schoukens, P. and D. Pieters (2009), 'The Rules within Regulation 883/2004 for Determining the Applicable Member State Legislation', *European Journal of Social Security*, 81–118.

[44] See also M Houwerzijl, *De detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG* (Kluwer 2005).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:06:15PM
via University College London (UCL)

14. Social security for mobile workers and labour law

Rob Cornelissen and Guido Van Limberghen

I. INTRODUCTION

This chapter focusses on the consequences of the co-existence of two systems determining the applicable law for workers, one in the field of social security and one in labour law.

The main principle of the rules determining the applicable legislation of the coordination regulation has always been the *lex loci laboris*. For special categories of workers, including posted workers and workers who normally are employed in the territory of two or more Member States, however, there are special rules determining the applicable legislation.

It follows from the case-law of the European Court of Justice that the provisions laid down in the EU regulations determining the legislation applicable form a complete system of conflict rules which are mandatory for Member States and *a fortiori* for the persons concerned.[1] The worker and his employer do not have the freedom to choose the applicable legislation.

The difference from the law applicable to individual employment contracts is striking. In accordance with private international law, the starting point for the system of conflict of law rules in matters of contractual relations between worker and employer is the parties' freedom to choose the applicable law. These rules are laid down in the 1980 Rome Convention on the law applicable to contractual obligations;[2] since the Amsterdam Treaty (1999) gave the Union the competence to do so,[3] Regulation 593/2008[4] was adopted, replacing the 1980 Rome Convention.[5]

Posting of workers is a very controversial issue in the EU. It follows from the case-law of the Court of Justice[6] that if an employer who is a cross-border service provider posts a worker, this worker is not to be considered covered by Article 45 TFEU and Regulation 492/2011. This means that this worker cannot invoke the equal treatment principle regarding working conditions in comparison to nationals of the host Member State. In contrast, the freedom to provide services gives businesses the right to provide services in another Member State without being discriminated against and/or

[1] Cases C-345/09 *Van Delft* [2010] ECR I-9879 and C-103/13 *Somova* (ECLI:EU:C:2014:2334).

[2] [1980] OJ L 266.

[3] Article 65 EC, currently Article 81 TFEU.

[4] Regulation (EC) 593/2008 [2008] OJ L 117.

[5] Regulation 593/2008 applies to contracts concluded after 17 December 2009.

[6] Case C-113/89 *Rush Portuguesa* [1990] ECR I-01417; Case C-43/93 *Van der Elst* [1994] ECR I-03803; Joined cases C-49/98,C-50/98, C-52/98 to C-54/98 and C-68/98 to C-71/98 *Finalarte* [2001] ECR I-07831. See, however, footnote 87.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

discouraged by the authorities of the host Member State. To that end, they may post their own workers temporarily to the other Member State to carry out the work necessary to provide the services. In 1996 a directive[7] was adopted in order to reconcile the exercise of this freedom to provide cross-border services under Article 56 TFEU with appropriate protection of the rights of workers temporarily posted abroad for that purpose. To this end the directive sets out a nucleus of mandatory rules (to be laid down in law or in collective agreements which have been declared universally applicable) that must be applied to posted workers in the host Member State.

The co-existence of two systems of conflict of law rules could have as a result that a worker is subject to the social security legislation of one Member State and to labour law of another Member State. This chapter will show how this could lead to problems for the worker concerned.

But before dealing with the subject on which this chapter is focussed (conflict of law rules) it is interesting to examine whether there are elements of labour law which are covered by the EU social security regulations.

II. ELEMENTS OF LABOUR LAW COVERED BY REGULATION 883/2004

For a scheme to be covered by the EU social security regulations three conditions must be fulfilled, namely it must be a social security scheme, it must be statutory and it must concern one of the branches mentioned in the exhaustive list of Article 3(1) Regulation 883/2004. Pay is undeniably part of labour law. But it can also be 'social security' within the meaning of the regulation. German and Dutch legislation, for instance, obliges the employer to continue to pay wages to the worker in the event that s/he cannot work due to illness. Since the *Paletta* judgment[8] we know that this sick pay is also sickness benefit within the meaning of Regulation 883/2004.

Occupational pensions are in principle excluded from the scope of the coordination regulations, since these regulations only cover statutory schemes. If supplementary pension schemes are based on law, they are covered by Regulation 883/2004.[9] However, the overwhelming majority of supplementary pension schemes are based on contractual agreements.

In its 1998 proposal to modernise Regulation 1408/71, the Commission proposed to extend the term 'legislation' to encompass all contractual provisions which have been the subject of a decision by the public authorities rendering them compulsory or extending their scope. However, this proposal was rejected by the Council. The notion 'legislation' excludes, in principle, contractual provisions which have been the subject of a decision by public authorities rendering them compulsory or extending their scope. However, a Member State can make a declaration, to be notified to the EU institutions, that such contractual provisions are to be considered as 'legislation' of that Member

[7] Directive 96/71/EC [1997] OJ L 18.
[8] Case C-45/90 *Paletta* [1992] ECR I-03423.
[9] The Danish Labour Market Pension Scheme (ATP) is an example.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

State. This was already possible under the old Regulation 1408/71.[10] The French AGIRC and ARCCO schemes, for instance, have been covered by the EU social security regulations since 1 January 2000.[11] It seems that the application of the EU regulations to these schemes has not led to major practical or administrative difficulties.

II.i Overwhelming Majority of Activation Measures Not Covered by Regulation 883/2004

Encouraged by the European employment strategy, Member States have, for more than a decade, taken a series of measures to stimulate non-active people to re-integrate into the labour market or to offer working people more opportunities to remain economically active. These activation measures can take different forms, such as programmes to help people to acquire new skills and upgrade existing ones, reduction of social security contributions for employers who recruit certain categories of jobseekers, supportive measures for employers who hire unemployed people or people with disabilities and all kinds of incentives for unemployed people to find and accept work. However, this development of active labour market policies has not led to any substantial change of the EU social security regulations.

Benefits are only covered by Regulation 883/2004 if they are related to one of the risks listed in Article 3(1). An unemployment benefit within the meaning of the EU social security regulations is essentially intended to replace the remuneration lost because of unemployment and thereby provide for the maintenance of the unemployed person.[12] Thus a benefit is not an unemployed benefit if the person concerned starts working again.[13] Another characteristic of unemployment benefit within the meaning of the EU regulations is that the person receiving the benefit is capable and willing to work and that he is available for the employment services.[14] This means that an unemployment benefit is still seen as a cash benefit that seeks to compensate for a loss of income and to secure maintenance. Regulations 883/2004 and 987/2009 do not or hardly[15] mirror the objective of (re-)integration into the labour market or to improve people's chances to remain in the labour market.

Only very partially active labour market measures are covered by the term unemployment benefit. It follows from the case-law of the Court[16] that also benefits

---

[10] Article 1(j) Regulation 1408/71.

[11] Notification by the French government to the Council of 29 March 1999 [1999] OJ C 215.

[12] Case C-102/91 *Knoch* [1992] ECR I-04341; Case C-57/96 *Meints* [1997] ECR I-06689.

[13] Case C-406/04 *De Cuyper* [2006] ECR I-06947; Case C-228/07 *Petersen* [2008] ECR I-06989.

[14] Case C-25/95 *Otte* [1996] ECR I-03745. In some specific cases (e.g. older unemployed people) the condition of being available for the employment services does not necessarily need to be translated into an obligation to register as a jobseeker: see *De Cuyper* note 13. Exceptionally, the person concerned may be relieved from the condition that he can work and is available for work, see *Petersen* note 13.

[15] Only occasionally is the objective of active labour market policies reflected in the text of the regulations, e.g. Article 55(6) Regulation 987/2009.

[16] Case 375/85 *Campana* [1987] ECR 02387.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

intended to prevent possible unemployment benefits, such as financial assistance during vocational training, can be seen as unemployment benefits within the meaning of the EU regulations. However, the Court has restricted this to assistance for vocational training which concerns either people who are already unemployed or people who are still in employment but are actually threatened by unemployment. It is for the national authorities to assess in each individual case whether a person in employment who applies for vocational training may be deemed to be actually threatened by unemployment.

Inspired by the *Campana* judgment, the Commission inserted a provision in its 1998 proposal to modify Regulation 1408/71 stipulating that an unemployed person who goes to another Member State in order to look for work should be entitled there to receive unemployment benefits, other than cash benefits, aimed at facilitating access to work under the same conditions as nationals of the host State.[17] This proposal was not accepted by the Council, since it doubted the added value of such a provision in comparison with the equal treatment provision guaranteed by Article 45 TFEU and Regulation 1612/68, the predecessor of Regulation 492/2011 (see below).

This rather old-fashioned approach means that benefits in kind aimed at (re-)integrating unemployed people into the labour market or at improving the employability and adaptability of workers are not covered by the regulation. Neither does the regulation apply to benefits in cash which do not satisfy the criteria indicated by the Court to be considered as unemployment benefits. A benefit, for instance, paid as a bonus to unemployed older people who restart working as employees does not satisfy these criteria, since it is not a replacement income for an unemployed person until he has found a new job. The same is true for measures providing for a reduction of employers' social security contributions.

II.ii The Importance of Free Movement Law for Activation Measures

However, national activation measures have to comply with Article 45 TFEU and Regulation 492/2001. These provisions guarantee that a worker who is a national of a Member State should not be treated, in the territory of another Member State, differently from national workers because of his nationality with regard to any conditions of employment and work, such as remuneration, dismissal and reinstatement. He shall receive the same assistance as that given by the employment offices in the host State to their own nationals seeking employment. Such a worker, even when he/she is a frontier worker,[18] should also enjoy the same social and tax advantages. Article 7 Regulation 492/2011 prohibits any discrimination based on nationality, be it directly or indirectly, of the worker coming from another Member State in the application of labour law of the host State. Any clause of a collective or individual agreement which violates this rule is null and void.

---

[17] Article 50(2) of document COM/98/779 final [1999] OJ C 38.

[18] Case C-57/96 *Meints* [1997] ECR I-06689; Case C-337/97 *Meeusen* [1999] ECR I-03289; Case C-212/05 *Hartmann* [2007] ECR I-06303.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

For a long time jobseekers coming from another Member State could not invoke Title II of Regulation 1612/68,[19] the predecessor of Regulation 492/2011. More recently, the Court adapted its case-law on this point. Now these jobseekers can invoke Article 7(2) and claim financial support made available to jobseekers in the host Member State, provided that there is a sufficiently close link between the person concerned and the host State's labour market.[20]

The Court has given a very wide interpretation[21] of the term 'social advantages' in Article 7(2). It covers, for instance, measures aimed at activation of workers and jobseekers, such as tide-over allowances aimed at facilitating, for young people, the transition from education to the labour market.[22] It also covers other activation measures, such as training and coaching vouchers for workers and benefits paid as a bonus to unemployed older people who restart working as employees.[23]

It follows from this case-law that also national provisions which do not take into account the nationality of the workers concerned but which preclude or deter a national of a Member State from leaving his country of origin to exercise his right to freedom of workers constitute an obstacle to that freedom, forbidden by Article 45 TFEU.[24] Such a national activation measure is only allowed if it pursues a legitimate objective in the public interest, if it is appropriate to ensuring the attainment of that objective and if it passes the proportionality test. It is for the national court to interpret and apply, in each individual case, domestic law in conformity with the requirements of European law.

The Court has clarified that the rights to freedom of movement laid down under Article 45 TFEU benefit not only workers, including jobseekers,[25] but also others, such as employers. The *ITC* case concerned an activation measure taken by the Member State of origin. By virtue of German legislation, fees were granted to private-sector recruitment agencies helping unemployed Germans to find a job. The condition was, however, that the job found by the agency was subject to compulsory social security contributions in Germany. In the case at issue the German agency (ITC) helped an unemployed German find a job in the Netherlands. According to Regulation 1408/71 the worker was subject to Dutch social security legislation. For this reason ITC was refused the fee by the German administration. The Court found[26] that the condition requiring the employed jobseeker to be subject to German social security interfered with free movement of workers. The condition at stake may deter jobseekers as well as

---

[19] Case 316/85 *Lebon* [1987] ECR 02811; Case C-278/94 *Commission v Belgium* [1996] ECR I-04307.

[20] Joined cases C-22/08 and C-23/08 *Vatsouras* [2009] ECR I-04585; Case C-367/11 *Prete* (ECLI:EU:C:2012:668).

[21] Case C-85/96 *Martinez Sala* [1998] ECR I-02691; Case C-137/04 *Rockler* [2006] ECR I-01441 and Case C-185/04 *Öberg* [2006] ECR I-01453.

[22] Case 94/84 *Deak* [1985] ECR 01873; Case C-258/04 *Ioannidis* [2005] ECR I-08275.

[23] Herwig Verschueren, 'Do National Activation Measures Stand the Test of European Law on the Free Movement of Workers?' [2010] *European Journal of Migration and Law* 81–103.

[24] Case C-415/93 *Bosman* [1995] ECR I-04921; Case C-18/95 *Terhoeve* [1999] ECR I-00345; Case C-190/98 *Graf* [2000] ECR I-00493.

[25] Case C-292/89 *Antonissen* [1991] ECR I-00745.

[26] Case C-208/05 *ITC Innovative Technology Center GmbH v Bundesagentur für Arbeit* [2007] ECR I-00181. See also Verschueren (note 23).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

private recruitment agencies from looking for work in another Member State. In addition, the condition did not stand the proportionality test and was prohibited by Article 45 TFEU.

Conclusion: a provision of national law, even if it is in line with Regulation 883/2004, is not always compatible with Article 45 TFEU and Regulation 492/2011. The mere fact that Regulation 883/2004 authorises a conduct on the part of Member States no longer shelters the national rules from further scrutiny.[27] This is not always an easy task for the national administrations charged with the application of these rules!

III. DETERMINATION OF THE APPLICABLE SOCIAL SECURITY LEGISLATION

III.i Exclusive Effect of the Rules

The exclusive effect means that you cannot be simultaneously subject to the legislation of two or more Member States.

Regulation no 3, applicable between 1959 and 1972, did not include an explicit provision prohibiting the simultaneous application of the legislation of two or more Member States. Article 12 of that regulation simply stated that a worker employed on the territory of a Member State 'shall be subject of the legislation of that State …'. The Court ruled[28] that Article 12 Regulation 3 did not prohibit Member States, other than the State whose legislation was applicable by virtue of the aforementioned article, from applying their social security legislation to mobile workers, if that simultaneous application led to a 'supplementary protection' of the worker concerned.

In order to reflect more clearly the intention of the Community legislature in this respect,[29] it was decided when Regulation 3 was replaced by Regulation 1408/71 to insert a provision[30] stipulating explicitly that persons to whom Regulation 1408/71 applied, were subject to the legislation of a single Member State only.

Like its predecessor, Regulation 1408/71, Regulation 883/2004 contains an explicit provision[31] that 'persons to whom this Regulation applies shall be subject to the legislation of a single Member State only'. The legislature even decided to insert a

---

[27] See for the so-called 'binary approach' of the Court, Eleanor Spaventa, 'The Impact of Articles 12, 18, 39 and 43 EC of the EC Treaty on the Coordination of Social Security Systems', in Y Jorens (ed), *50 Years of Social Security Coordination*, *Report of the Conference Celebrating the 50th Anniversary of the European Coordination of Social Security* (European Commission 2009) 112–128.

[28] Case 92/63 *Nonnenmacher* [1964] ECR 00557 and Case 19/67 *Van der Vecht* [1967] ECR 00445.

[29] See the explanatory memorandum to the Commission's proposal [1966] COM (66)8, 22.

[30] Article 13(1) first sentence Regulation 1408/71.

[31] Article 11(1).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

recital[32] into Regulation 883/2004 stating that 'the principle of unity of the applicable legislation is of great importance and should be enhanced'.[33]

The wording of Article 11(1) Regulation 883/2004, identical to that of Article 13(1) Regulation 1408/71, could not be clearer. And until a number of years ago, the Court indeed confirmed and even emphasised the exclusive effect of the conflict of law rules.[34] This case-law guaranteed the predictability of the conflict of law rules as well as legal certainty. However, despite the very clear wording of the conflict of law rule concerned, we know since the *Bosmann* judgment[35] that it is in some cases possible that a worker is also covered by the social security legislation of a Member State other than the one designated as the competent one by the regulation. In those rather exceptional cases, we see, surprisingly, a similarity with the result of the rules determining the law governing the individual contract between worker and employer.

Ms Bosmann, a Belgian national, was a single mother living with her two children, students of 20 and 21 years old, in Germany. Under German law, all residents are entitled to family benefits for children of such ages who are students. In 2005 Ms Bosmann started to work as an employed person in the Netherlands. Her claim for family benefits in the Netherlands was rejected, because the legislation of the Netherlands only provides for family benefits for children up to the age of 18. Her claim for German family benefits was rejected for the reason that she, being employed in the Netherlands, was subject to the legislation of the Netherlands. The German authorities referred to Article 13(2)(a) Regulation 1408/71 stipulating clearly: 'persons to whom this Regulation applies, shall be subject to the legislation of a single Member State only'. Ms Bosmann appealed against this decision and the case finally came before the Court.

In its judgment the Court emphasised that all provisions of the EU regulations on the coordination of social security systems must be interpreted in the light of Article 42 EC (currently Article 48 TFEU), which aims to prevent workers who have made use of their right to free movement being penalised in the field of social security.[36] In addition, the Court referred to the first recital of Regulation 1408/71[37] stating that the rules for coordination of national social security systems should contribute towards improving the standard of living and conditions of employment for people exercising their right of free movement. Therefore, the Member State of residence cannot be deprived of the right to grant family benefits to those who are resident within its territory. Even when it was denied,[38] by this judgment the Court overruled its previous case-law[39] on the matter. In the 1986 *Ten Holder* and *Luyten* judgments the Court emphasised that the exclusive effect of the rules on conflicts of law was not at variance

---

[32] Recital 18a Regulation 883/2004 as amended by Regulation 988/2009.

[33] This is linked to the fact that Regulation 883/2004 no longer contains exceptions to the exclusive effect of the applicable social security legislation, as was the case under (Articles 14c and 14f of) the old Regulation 1408/71.

[34] Case 302/84 *Ten Holder* [1986] ECR 01821; case 60/85 *Luyten* [1986] ECR 02365.

[35] Case C-352/06 *Bosmann* [2008] ECR I-03827.

[36] *Bosmann* judgment [29].

[37] The first recital of Regulation 883/2004 is almost identical.

[38] *Bosmann* judgment [32].

[39] Case 302/84 *Ten Holder* [1986] ECR 01821; Case 60/85 *Luyten* [1986] ECR 02365.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

with the *Petroni* principle, according to which the application of the Regulation cannot entail the loss of rights acquired exclusively under national legislation. The Court ruled in these 1986 judgments that that principle did not apply to the rules for determining the applicable legislation. In its *Bosmann* judgment, on the contrary, the Court implies[40] that the *Petroni* principle does apply to the rules determining the applicable social security legislation.

A couple of years later the Court went even further. Mr Hudzinski, a Polish national, worked as a self-employed farmer in Poland where he lived with his family. In 2007 he worked as a seasonal worker in Germany and was, on that basis, subject to unlimited income tax liability there. Under German legislation non-residents who are subject to unlimited income tax liability are entitled to family benefits. However, by virtue of Regulation 1408/71 he continued, as a posted self-employed person, to be subject to Polish social security legislation,[41] even during the period when he worked in Germany. Mr Wawrzyniak was a Polish national residing with his family in Poland. He was as an employed worker in Poland covered by Polish social security legislation. In 2006 Mr Wawrzyniak was posted by his employer to work for almost a year in Germany. During that period he was also subject to unlimited tax liability in Germany. However, he continued, as a posted employed person, to be subject to Polish social security legislation,[42] even during the period when he worked in Germany. Both Polish men referred to the *Bosmann* judgment when claiming German family benefits from the German institution for the period during which they worked in Germany. Their claims were rejected by the German institution because they were subject to Polish social security legislation during the periods when they worked in Germany.

In its judgment[43] the Court not only confirmed the approach it took in its *Bosmann* judgment, but even enhanced it. In fact, the *Hudzinski* and *Wawrzyniak* cases differ from the *Bosmann* case in two respects. In the first place, Ms Bosmann's main argument was that she had suffered a legal disadvantage by reason of the fact that she had made use of her right to free movement. In fact, Ms Bosmann did not receive any family benefits at all from the Netherlands, the Member State to whose legislation she was subject by virtue of Regulation 1408/71. Mr Hudzinski and Mr Wawrzyniak continued to receive Polish family benefits while working in Germany. They did not lose any rights because they had exercised their right to free movement. In the second place, Ms Bosmann resided with her children in Germany, whereas the two Polish men and their children did not reside in Germany, but in Poland.

The Court repeated that the provisions of Regulation 1408/71, including the rules determining the applicable legislation, must be interpreted in the light of Article 48 TFEU which is to contribute to the establishment of the greatest possible freedom of movement for migrant workers. And again the Court underlined that the regulation as a whole seeks to contribute to the improvement of the standard of living and conditions

---

[40] See in particular *Bosmann* judgment [29].

[41] Article 14a(1)(a) Regulation 1408/71, corresponding to the current Article 12(2) Regulation 883/2004.

[42] Article 14(1)(a) Regulation 1408/71, corresponding to the current Article 12(1) Regulation 883/2004.

[43] Joined Cases C-611/10 and 612/10 *Hudzinski and Wawrzyniak* (ECLI:EU:C:2012:339).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

of employment of migrant workers, as follows from its first recital. It would go beyond the objective of the regulation based on Article 48 TFEU and exceed the purpose and scope of that article to interpret that regulation as prohibiting a Member State from granting workers and members of their family broader social protection than that arising from the application of that Regulation. In this context the Court says explicitly that the *Petroni* principle also applies to the rules determining the applicable social security legislation;[44] EU legislation cannot be applied in such a way as to deprive a migrant worker of benefits granted solely by virtue of the legislation of a single Member State. Therefore, even when the two men are subject to Polish legislation, Germany cannot be denied the right to grant family benefits. Germany has this right, even if the men in question do not suffer any disadvantage for having made use of their right to free movement. In the *Bosmann* case the non-competent Member State which had the right to apply its national legislation was the State of residence. The *Hudzinski and Wawrzyniak* judgment[45] clarified that the non-competent Member State which has the right to apply its national legislation is not necessarily the State of residence. It can be another Member State with which the worker has a close connection, such as being subject to unlimited income tax liability.

This case-law is not limited to family benefits, but also concerns other branches of social security such as sickness benefits, including long-term care benefits, as the *Von Chamier* judgment[46] has clarified.

This case-law of the Court seems to justify the conclusion that a worker who fulfils the conditions for entitlement to benefits on the basis of national legislation of a State whose legislation is not the applicable one designated by Regulation 883/2004, but with whom he is closely connected, can claim a differential amount from this State, if the benefits provided by that State are more favourable than those provided by the Member State designated by the regulation. Let us take as an example a pensioner who receives a pension from both Germany and Portugal and who resides in Portugal. Articles 23 and 29 Regulation 883/2004 determine Portugal as the Member State responsible for granting sickness benefits in cash to this pensioner. It is a conflict of law rule.[47] However, if the Portuguese benefits relating to the risk of reliance on care do not exist or are at a lower level than that of the benefits relating to that risk from Germany with whom the pensioner has a close connection,[48] he will be entitled to a topping-up of the benefit equal to the difference between the two amounts.[49] Although this case-law might correctly be perceived as filling a gap in the protection of the worker in the specific cases concerned, it does not necessarily serve legal certainty and the predictability of the conflict of law rules. In fact, there are still a number of question marks about the reach and limits of the *Bosmann* and subsequent case-law of the Court. According to this case-law a worker can also be covered by the social security

[44] *Hudzinski and Wawrzyniak* judgment [56].

[45] Joined Cases C-611/10 and 612/10 *Hudzinski and Wawrzyniak* (ECLI:EU:C:2012:339).

[46] Case C-208/07 [2009] ECR I-06095.

[47] Case C-345/09 *Van Delft* [2010] ECR I-9879.

[48] He draws a pension from that Member State and he is, under German law, voluntarily insured with the German care insurance.

[49] Case C-388/09 *de Silva Martins* [2011] ECR I-05737.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

legislation of a Member State other than the competent one designated by the regulation, if there is a 'close connection' between the person concerned and the non-competent Member State. It is not always easy to determine whether or not such 'close connection' exists.

In a recent case concerning a Czech national[50] the Court denied the non-competent Member State the right to grant family benefits on the basis of national law, because it did not have a sufficiently 'close connection' with the person concerned. The woman in question had lived in France with her husband for a number of years. Her husband worked in France, the family was covered by French health insurance, their child was born in France, and she had worked in France and had received maternity benefit and a specific family benefit in France. As a 'post-active person' she was, by virtue of (Article 13(2)(f)) Regulation 1408/71 subject to French legislation. Once her entitlement to the specific French family benefit ceased, she applied for family benefits in the Czech Republic. In fact, it appeared from the file that according to Czech law any person who has registered as permanently resident in the Czech Republic is entitled to parental allowance. The case finally came before the Court, which delivered a judgment without an opinion of the Advocate-General.

The Court had to make a judgment on the question whether or not the non-competent Member State was, under these circumstances, allowed to grant the woman family benefits. The Court noted that in this case there was not a sufficiently close link with the non-competent Member State, such as residence (as in the *Bosmann* case) or being subject to unlimited income tax (as in *Hudzinski*). The only connection she had with the Czech Republic was that she and her husband continued to have a home there and were still registered as residents in the Czech Republic, even when it appeared from all the facts and circumstances that their real residence (centre of interests) was in France. The Court ruled that Article 13 Regulation 1408/71 (corresponding to Article 11 Regulation 883/2004) precluded the non-competent Member State from granting family benefits. The Court emphasised that the predictability and effectiveness of the application of the coordination rules should not be disproportionately affected. However, it cannot be deduced from this judgment that the *Bosmann* case-law is no longer valid. On the contrary, the Court clarified that if there are 'specific and particularly close connecting factors' between the person and the non-competent Member State, this Member State is allowed to grant workers and members of their family broader social protection than that arising from the application of the regulation. This has recently been confirmed by the *Franzen* judgment (see below). It is up to the national courts to decide whether or not there is a sufficiently 'close connection' between the person and the non-competent State. In some cases this might be a tedious exercise.

If indeed a 'close connection' exists, the question arises about the extent of the 'right' of the non-competent Member State to grant benefits. In the *Bosmann* and *Hudzinski* judgments the Court ruled that the Member State, not being the Member State designated by the regulation, but which has a 'close connection' with the person concerned, could not be denied the 'right' to grant family benefits. What does this mean? Can the non-competent Member State in question having a 'close connection' with the persons concerned introduce provisions into its legislation excluding such

[50] Case C-394/13, *'B'* (ECLI:EU:C:2014:2199).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

persons for the sole reason that they receive comparable benefits from another Member State? There is no doubt that such a provision would be considered by the Court as being incompatible with Articles 45–48 TFEU. In fact, the final question the Court had to deal with in the *Hudzinski* case was the following. By virtue of German law, a person who has a close connection with Germany, such as being subject to unlimited income tax there, and who fulfils all conditions for entitlement to family benefits is nevertheless excluded from these benefits if a comparable benefit is paid by another State. The Court was asked whether this provision was compatible with Union law. The Court replied that such legislation is likely to put migrant workers at a disadvantage compared with workers who have worked in only one Member State. A provision reducing the amount of foreign family benefits from the amount due under its own legislation would be acceptable, but it would be incompatible with Articles 45–48 TFEU to exclude the persons concerned from entitlement to such benefits. In other words, it follows from this case-law that a Member State, not being the competent Member State designated by the regulation, has the 'right' to grant family benefits to a worker with whom it has a 'close connection' and who fulfils the conditions laid down in its legislation for entitlement to benefits. But in practical terms, this Member State is in such a situation actually obliged to grant such benefits to the workers concerned. Entitlement cannot be denied for the sole reason that the person receives a comparable benefit from another Member State.

Can the non-competent Member State which has a 'close connection' with the persons concerned introduce provisions in its legislation excluding such persons from its social security coverage for the sole reason that they are subject to the legislation of another Member State? This question has been submitted to the Court in the *Franzen* case,[51] which was at the time of writing this chapter still pending. The case concerns a number of citizens who have the nationality of the Netherlands and who reside in the Netherlands. They were for some years engaged in minor employment in Germany. For this reason they were, in accordance with Article 11(3(a) Regulation 883/2004, subject to German legislation. However, by virtue of German law, persons in minor employment are not covered by insurance concerning unemployment, family benefits and old age. Such persons are only insured against the risk of accidents at work and professional diseases. According to the legislation of the Netherlands everybody residing in the Netherlands is covered by insurance concerning family benefits and old age, except people who are subject to the legislation of another Member State. The persons concerned claimed family benefits and old-age pension in the Netherlands for the years that they were engaged in minor employment in Germany. The Dutch institutions based their refusal on the fact that during these periods they were, in accordance with Regulation 1408/71, subject to German and thus not to Dutch legislation. The Dutch court requested a preliminary decision of the Court about the important question whether in these circumstances Union law precludes the application of Dutch legislation which excludes residents in its territory from its social security coverage for the sole reason that they are subject to the legislation of another Member State. In his conclusions, the Advocate-General clarified that there was no doubt that the persons concerned were, during the periods in question, subject to German

[51] Case C-382/13, *Franzen*, (ECLI:EU:C:2015:261).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

legislation. Therefore, in principle, the State of residence may exclude persons residing on its territory from its social security coverage for the sole reason that they are subject to the legislation of another Member State. The Advocate-General continued his conclusions, however, by examining the final result of the application of the relevant rules for the persons concerned. He emphasised that the application of the conflict of law rules laid down in Regulation 1408/71 resulted in the persons concerned being subject to German legislation, which in turn resulted in the persons concerned being excluded from Dutch social security. The final result was that the persons concerned had lost their social protection concerning family benefits and old age guaranteed by their State of residence, without having obtained any comparable protection in the competent State. This result is incompatible with the objective pursued by Articles 45–48 TFEU, namely to prevent persons being penalised in the field of social security for having exercised their right to free movement of workers. In order to avoid such results, he proposed that the application of the legislation of the State of employment (competent State) should be suspended if the application of that legislation does not lead to any social protection concerning family benefits or old age. This temporary suspension should be limited to the periods during which the legislation of the State of employment continues to exclude the persons concerned from any protection concerning the aforementioned branches. During this period of suspension, the persons concerned should be subject to the legislation of the State of residence.

There are strong arguments for agreeing with the Advocate-General that the final result of the relevant rules for the persons concerned is incompatible with Articles 45–48 TFEU. However, the way in which the Advocate-General wants to avoid such a result raises questions. In practical terms, he proposes that in circumstances such as in the present case, the level of protection should play a role in determining the applicable social security legislation.[52] It is up to the national courts to make the necessary findings. The task of the national court to make a comparison between the levels of social protection offered by any two States involved may in some cases prove to be an exercise which is particularly tedious, and in other cases profoundly uncertain. The Advocate-General suggests furthermore that the suspension of the legislation of the State of employment only applies to the branches of social security for which the State of employment does not offer any protection.[53] In practical terms, he suggests that during the aforementioned period of suspension the persons concerned would be subject to the legislation of two Member States at the same time: the State of residence for those branches for which the State of employment does not offer any protection and the State of employment for those branches for which it does offer sufficient protection (such as accidents at work). This suggestion too raises questions about legal certainty and predictability of the coordination rules.

In its judgment of 23 April 2015 (ECLI:EU:C:2015:261) the Court did not follow the opinion of the Advocate-General on this point. Instead, the Court referred to the *Bosmann* case-law and repeated that a Member State which is not the competent one by virtue of Title II of the regulation, has nevertheless the power to grant, under certain conditions, benefits to a mobile worker under its own national law. By solving the case

[52] Conclusion in *Franzen* [89].
[53] Point 94 third sentence.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

in this way, the Court actually avoided answering the third question raised by the referring court. The question was whether Union law precluded, in the circumstances of the present case, the application of the legislation of a Member State according to which its residents are excluded from the social security coverage of that Member State for the sole reason that they are subject to the legislation of another Member State.

III.ii Main Principle: *Lex Loci Laboris*

The rules determining the applicable social security legislation do not pay attention to the content of the applicable law or to the law which would offer the most favourable benefits for the worker. However, the interests of the worker the EU social security regulations seek to protect are closely linked to the realisation of free movement of workers.[54] One of the main pillars of free movement of workers is the principle of equal treatment between migrant workers and national workers of the host State. This explains why the main principle of the rules determining the applicable social security legislation is the *lex loci laboris*.

The *lex loci laboris* rule is based on the principle that a migrant worker should have the same rights as national workers in the host State.[55] This principle seeks to prevent unfair competition between employers who use migrant workers in a Member State and those who only use non-migrant workers.[56] It is only when the application of the law of the workplace would be either impossible or inappropriate because of the nature of the work performed that the rules have, by way of exception, established other connecting factors for the determination of the applicable social security legislation.

III.iii Posting

From the first coordination rules the law of the workplace did not apply where a worker is sent by his employer for a short period to another Member State to work there on the employer's behalf. It would be a severe burden on workers, employers and social security institutions if the worker was required to be insured under the social security system of every Member State to which he was posted in the course of his employment, even if such posting was of very short duration.[57] However, in the *Manpower* and *Van der Vecht* judgments the Court[58] gave a rather extensive interpretation of the term 'posting' by deciding that the posting provisions also apply to a worker who is recruited with a view to being posted to another Member State.

---

[54] Case C-212/06 *Walloon government v Flemish government* [2008] ECR I-01683.

[55] This idea is reflected in recital 17 Regulation 883/2004. It is also underlined by the Court on numerous occasions: Case C-68/99 *Commission v Germany* [2001] ECR I-01865; Case C-249/04 *Allard* [2006] ECR I-01513; Case C-493/04 *Piatowski* [2006] ECR I-02369; Case C-103/06 *Derouin* [2008] ECR I-01853.

[56] Herwig Verschueren, 'Cross-Border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law?' (2008) 24(2) *International Journal of Comparative Labour Law and Industrial Relations* 167–199.

[57] Case 19/67 *Van der Vecht* [1967] ECR 00445; Case 35/70 *Manpower* [1970] ECR 01251.

[58] Ibid.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

The Court has, from the very beginning,[59] mentioned not only the interests of the worker, but also those of the employer and of the social security institution. The development in the Court's reasoning on the objective of the posting provisions in the field of social security is even more interesting. Initially, the objective of simplification was underlined. However, in its 2000 *Fitzwilliam* judgment,[60] the Court ruled that the purpose of the posting provisions is 'in particular, to promote freedom to provide services for the benefit of undertakings which avail themselves of it by sending workers to Member States other than that in which they are established'. The objective of simplification is mentioned only in the second place.

In labour law one of the connecting factors for determining the applicable law is the 'country in which or from which the employee habitually caries out his work in performance of the contract'.[61] The posting provisions in EU law on social security refer to 'a person who pursues an activity as an employed person in a Member State on behalf of an employer which normally carries out its activities there and who is posted by that employer to another Member State to perform work on that employer's behalf'.[62] The decisive element here is not that the worker habitually carries out his work in the sending State, but that he is attached to an employer which normally carries out its activities in the sending State.

The application of the posting provisions is subject to a number of conditions to prevent the posting provisions from being used in cases for which they are not intended. Firstly, posting has to be temporary: Article 12 mentions a strict maximum time limit of 24 months. If the anticipated duration goes beyond 24 months, the posting provision does not apply at all. If, for reasons not foreseen, the duration of the work in the host State goes beyond 24 months, the worker will, after the expiration of this period, in principle be subject to the social security legislation of the host State, unless an Article 16 agreement is concluded between the competent authorities of the two States. Secondly, in order to avoid rotation of personnel performing the same activities, the worker may not be sent to replace a worker who has completed an earlier period of posting. Thirdly, in order to reflect the goal of achieving continuity in the affiliation of the worker to the social security system of the sending Member State, the worker must have been subject to the legislation of the sending State prior to the posting. Fourthly, the worker should continue to be under the authority of the employer which posted him: there must be a direct relationship between worker and employer for the whole duration of the posting.

Fears were expressed in the *Fitzwilliam* and *Plum*[63] cases that the application of the posting provisions by 'letterbox' companies or by temporary employment agencies could lead to abuse. As a result, the Court[64] confirmed that there had to be a direct relationship between the undertaking providing temporary personnel and the posted

---

[59] Ibid.

[60] Case C-202/97 *Fitzwilliam* [2000] ECR I-00883, repeated in Case C-404/98 *Plum* [2000] ECR I-09379.

[61] Article 8(2) Regulation 593/2008 [2008] OJ L 177.

[62] Article 12(1) Regulation 883/2004.

[63] Case C-404/98 *Plum* [2000] I-09379.

[64] Case C-202/97 *Fitzwilliam,* [2000] ECR I-00883.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

worker. In addition, it imposed another condition on the use of posting arrangements by such agencies, namely that they must normally carry on their business in the territory of the State in which they are established. The latter condition means that the undertaking should habitually carry out significant activities in the sending State. By imposing the last condition, the Court wanted to prevent 'letterbox' firms from using the posting provisions. This case-law is now reflected in provisions laid down in Regulation 987/2009.[65]

Posting is a very sensitive issue. For some Member States and interest groups, the conditions are too strict and lead to protection of the market of the host State. For other Member States and interest groups, the application of the posting provisions lead to unfair competition and constitutes a danger for the level of social protection in the host State.

III.iv Pursuit of Activities in Two or More Member States

For obvious reasons, the application of the law of the workplace is not suitable in cases where a person normally pursues activities in two or more Member States. For workers with such a working pattern, other connecting factors have been incorporated in special rules.

In labour law, the connecting criteria for determining the applicable law are either the 'country in which or, failing that, from which the employee habitually carries out his work' or, in the absence of such a place, that of the 'country where the place of business through which the employee was engaged is situated'. For social security the first connecting factor for determining the applicable law for workers normally working in two or more Member States is the notion '*substantial part*' of the worker's activities. Workers who normally work in two or more Member States and who pursue a 'substantial part' of their work in their Member State of residence[66] are subject to the social security legislation of that State. 'Substantial part' means a quantitatively substantial part. Working time and/or remuneration constitute indicative criteria. A share of less than 25 per cent of these criteria creates the presumption that there is no 'substantial part'. When assessing these criteria the assumed future situation for the next 12 months has to be taken into account. With the help of concrete examples, the Practical Guide provides very useful guidance in order to clarify the notions used in Regulations 883/2004 and 987/2009 and also provides useful tools for assessing these notions for all kinds of specific groups, such as international transport workers.

In labour law, the second connecting factor, namely the 'country where the place of business through which the employee was engaged is situated', only plays a role when it is not possible for the court to determine the State in which the worker habitually carries our his work.[67] The approach in social security is similar, but slightly different. If the person concerned does not pursue a substantial part of his activity in the Member

[65] Article 14.

[66] Since the entry into force of Regulation 465/2012, the requirement of pursuing a 'substantial part' of the work in the Member State of residence applies not only for workers having only one employer, but also for workers having two or more employers.

[67] Case C-29/10 *Koelzsch* [2011] ECR I-01595.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

State of residence, then the decisive criterion is the 'registered office or place of business' of the employer or of one of the employers. The rules of Article 13(1)(b) Regulation 883/2004 are very detailed indeed.[68]

III.v Article 16: A Flexible Article

Article 16 Regulation 883/2004 stipulates that two or more Member States may by common agreement provide for exceptions to the rules governing applicable legislation laid down in Articles 11–15. Article 16 is characterised by great flexibility. It allows Member States to adopt 'tailor-made' solutions for certain categories of people. In addition, it provides both a remedy and the only legal means for normalising complex situations. It creates the possibility to deal with specific situations that require the rules on determining applicable legislation to be adapted. The task of identifying such situations and of determining which legislation is applicable has been entrusted to the Member States involved. Member States enjoy a wide discretion in using Article 16.[69] In practice, Article 16 is often used in order to exempt workers from being subject to the legislation of the host State in situations where not all posting requirements are met. For example, if it is known that the anticipated duration of a posting will extend beyond 24 months, an Article 16 agreement can be concluded between the sending and host States in order to keep the worker(s) concerned under the legislation of the sending State. A number of Article 16 agreements relate to specific enterprises engaged in European projects, such as in the aerospace industry, or within the framework of cooperation between two Member States. Other agreements concern workers who are mobile within a corporate group.

There is only one condition for applying Article 16: the agreement shall be in the interest of the worker. If the only condition under which Article 16 may be applied is the worker's interest, great importance is obviously attached to the question of the criteria to be applied in deciding whether or not the agreement is indeed in the interest of the worker, but so far the Court has not passed a judgment on this matter. During the negotiations on the Commission proposal leading to Regulation 987/2009, the suggestion to include such criteria was discussed in Council, but was not acceptable for several Member States. In other words, there is neither case-law nor a clarification in the implementing regulation on the question as to which criteria should be applied to assess whether or not an agreement is in the interest of the worker.

The issue of 'interest of the worker' is a rather sensitive one. By virtue of Article 18 Regulation 987/2009, a request for applying Article 16 Regulation 883/2004 must be submitted by the employer or the worker, whenever possible in advance, to the competent authority of the Member State whose legislation is requested to be applied. Often such a request is signed by both the employer and the worker(s) concerned. But it seems to be premature to conclude that such a 'mutual' request automatically shows that the agreement requested would be in the interest of the worker(s). In fact, in a number of cases making such a request has been more or less imposed on the worker(s)

---

[68] Further detailed rules are to be found in Article 14 of the Implementing Regulation 987/2009.

[69] Case 101/83 *Brusse* [1984] ECR 02223.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

concerned by the employer seeking to pay contributions in the State which is most favourable for him. This issue has become even more important since we know that after the *Schlecker* judgment (see below under Section IV.ii.b.) the result of the rules determining the applicable social security legislation laid down in Regulation 883/2004, including its Article 16, may have an impact on the application of the rules determining the applicable labour law. Article 16 agreements can have retroactive effect. In fact, it follows from the spirit and scheme of Article 16 that an agreement within the meaning of that provision must also be capable, in the interest of the worker(s) concerned, of covering past periods.[70]

IV. DETERMINATION OF THE LEGISLATION APPLICABLE ON INDIVIDUAL EMPLOYMENT CONTRACTS

IV.i Introduction

Contrary to the EU rules determining the applicable social security legislation, the worker and the employer have the freedom to choose the applicable labour law. The choice must be made expressly or demonstrated clearly by the terms of the contract or the circumstances of the case. An agreement between the parties to confer on the courts of a Member State exclusive jurisdiction to determine disputes under the contract is one of the factors to be taken into account[71] in determining whether a choice of law has been clearly demonstrated.

If a choice has not been made, then the applicable labour law is determined in accordance with the criteria laid down in Article 8(2) to (4) Regulation 593/2008.

However, the freedom of choice as to which labour law is applicable has been curtailed to some extent, in order to protect the worker, being considered as the weaker party from a socio-economic point of view.[72] Indeed, given the element of subordination which characterises the employment relationship, the worker runs the risk that an employer will impose on him the application of the law of a country which is objectively unrelated to the reality of the contractual relationship between them. To this end, Articles 8 and 9 Regulation 593/2008 contain specific rules. These rules are similar to those previously laid down in the 1980 Rome Convention. The functioning of these rules has been eloquently worded by Advocate-General Wahl in his conclusions in the *Schlecker* case.[73]

First of all, Article 8(1) prohibits the parties to the contract from depriving the worker of the protection which he would enjoy under the mandatory rules (rules from which the parties cannot derogate by contract[74]) of the law which would have been

---

[70] See *Brusse*, previous note; Case C-454/93 *Van Gestel* [1995] ECR I-01707.

[71] See recital 12 Regulation 593/2008.

[72] Case C-29/10 *Koelzsch* [2011] ECR I-01595.

[73] Conclusions of Advocate-General Wahl, Case C-64/12, *Schlecker* (ECLI:EU:C:2013:241).

[74] Examples: the rules concerning health and safety at work, minimum wages, paid leave or sick leave. It also means that if the law of the Member State designated by Article 8(2), (3) or

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

applicable to the employment contract if they had not expressed any choice. In other words, in dealing with a contract in which the parties have chosen the applicable law, the court must first determine, in accordance with the criteria set in Article 8(2), (3) and (4) which law would apply to the employment contract had there been no choice of law, the so-called 'objectively applicable' law. It must then consider whether that 'objectively applicable' law contains mandatory rules for the protection of workers. Lastly the court must apply, among those mandatory rules, those which are more favourable to workers than the relevant provisions of the law chosen by the parties. The latter law continues to be applicable as to the remainder. In other words, in labour law the concomitant application of the legislation of more than one Member State is normal, whereas this is exceptional in social security legislation (see Section III.i).

The overriding mandatory provisions within the meaning of Article 9 Regulation 593/2008 are a different matter. These are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, to such an extent that they are to be applied whenever there is a connection between the legal situation and its territory; whatever law is otherwise applicable to the contract. These overriding mandatory rules are not defined by Regulation 593/2008. Each court must decide whether this or that provision is an 'overriding mandatory' provision within the meaning of Article 9 and the answer is not always obvious.

IV.ii Objective and Nature of the Connection Criteria of Article 8(2), (3) and (4) Regulation 593/2008

The provisions contained in Article 8(2) to (4) do not have as an objective to systematically favour the worker.[75] It follows from Article 8(1) that in situations where the parties have made a choice of law, the court must make a comparison between the substantive content of the rules of the law chosen by the parties on the one hand, and the mandatory rules of the 'objectively applicable' law on the other hand. In such situations the court must apply the rules which are more favourable to the worker. In contrast, in order to determine the 'objectively applicable' law, the courts are not required to compare the substantive content of the mandatory rules of the laws resulting from applying Article 8(2) to (4), and to apply to the worker the law which seems to be most favourable among them.

The main objective pursued by Article 8(2) to (4) is to offer adequate protection of the worker by making applicable to him the rules under the law of the country with which the employment contract is most closely connected (principle of proximity). In order to do so, it is for the court to determine the centre of gravity of the contractual relationship by using the criteria set out in Article 8(2) to (4).

Article 8(2) Regulation 593/2008 stipulates that, in situations where no choice of law has been made, the contract shall be governed by the law of the country in which or,

---

(4) makes the collective employment agreements binding on the employer, the worker will not be deprived of the protection afforded to him by these collective employment agreements by the choice of law of another State in the individual employment contract.

[75] Case C-64/12 *Schlecker*, (ECLI:EU:C:2013:551)[34].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

failing that, from which[76] the worker habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country. Where the law applicable cannot be determined pursuant to Article 8(2), the contract shall, in accordance with Article 8(3), be governed by the law of the country where the place of business through which the worker was engaged is situated. By virtue of Article 8(4), where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

IV.ii.a Hierarchy between Article 8(2) and Article 8(3) Regulation 593/2008

It follows from the case-law of the Court that there is a hierarchy between the rules laid down in paragraphs 2 and 3 of Article 8. In fact, given the objective of Article 8 Regulation 593/2008, referred to above (guaranteeing adequate protection to the worker by making him subject to the law of the country with which the employment contract is most closely connected), the criterion set out in paragraph 1 has to be given priority[77] over the criterion laid down in paragraph 2. It is in the State where the worker 'habitually carries out his work' that he performs his economic and social duties, and it is there that the business and political environment affects employment activities. Therefore, compliance with the employment protection rules provided for by the law of that country must, as far as is possible, be guaranteed. Consequently, the criterion of the country in which the worker 'habitually carries out his work' set out in paragraph 2 must be given a broad interpretation, while the criterion of 'place of business through which the worker was engaged', set out in paragraph 3, only applies in cases where the court is not in a position to determine the country in which the work is habitually carried out. This means, for instance, that paragraph 2 also applies in a situation where the worker carries out his activities in more than one Member State (such as transport workers, truck-drivers, pilots, seamen) if it is possible for the court to determine the State with which the work has a significant connection (place of centre of activities, or, in the absence of a centre of activities, place where the worker carries out the majority of his activities).[78] In such cases the court has to take into account all the factors which characterise the activity of the worker.[79]

IV.ii.b No hierarchy between Article 8(2) and Article 8(4) Regulation 593/2008

Until recently there have been two conflicting views in literature as to the relationship between the connecting criteria referred to in Article 6(2) first part of the Rome Convention (corresponding to Article 8(2) Regulation 593/2008) and the escape clause

---

[76] In comparison with the wording of Article 6(2) of the 1980 Rome Convention the words 'from which' have been added in view of workers in the transport sector, such as truck drivers, seamen and pilots.

[77] Case C-29/10 *Koelzsch* [2011] ECR I-01595; Case C-384/10 *Voogsgeerd* [2011] ECR I-13275.

[78] Case C-383/95 *Rutten* [1997] ECR I-00057.

[79] Case C-29/10 *Koelzsch* [2011] ECR I-01595; Case C-384/10 *Voogsgeerd* [2011] ECR I-13275.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

set out in Article 6(2) second part of the Rome Convention (corresponding to Article 8(4) Regulation 593/2008).

According to the first view (shared by the majority of authors), the fundamental relationship between the two provisions is that of the rule and exception, which means that the search for possible closer connections with a country other than that where the worker 'habitually caries out his work in performance of the contract' can occur only in exceptional circumstances.

According to the second view there is no hierarchical relationship between the two provisions and the courts have a measure of discretion in determining the law most closely connected with the relevant contract.

In its *Schlecker* judgment[80] the Court, following the Advocate-General, has opted for the second interpretation. The court may always, in accordance with Article 8(4) Regulation 593/2008, consider it necessary to disregard the law resulting from applying paragraphs 2 or 3, where there are closer connections with another country. In other words, Article 8(4) is to be seen as an open conflict rule capable of supplanting both the law of the place where the work is 'habitually carried out' and the law of the 'place of business through which the employee is engaged'. This means that, even where an employee carries out the work in performance of his employment contract not only habitually but also for a lengthy period in one country, the national court may, under Article 8(4) Regulation 593/2008, disregard the law applicable in that country where it is clear from the circumstances as a whole that there is a closer connection between that contract and another country.

The facts in the *Schlecker* case were as follows. Ms Boedeker, a German national and resident, pursued her professional activity without interruption and exclusively in the Netherlands for more than 11 years when a dispute between her and her employer, the firm Schlecker, resulted in a claim by Ms Boedeker that Dutch law should be declared applicable to her employment contract. The Dutch judiciary accepted Ms Boedeker's claim and terminated her contract awarding her compensation of a considerable amount. Schlecker appealed that decision. Schlecker submitted a number of factors suggesting that the employment contract was more closely connected with Germany than with the Netherlands. The highest Dutch court decided to refer the following question to the European Court of Justice:

> Is Article 6(2) of the Rome Convention to be interpreted in such a way that, if an employee carries out the work in performance of the contract not only habitually but also for a lengthy period and without interruption in the same country, the law of that country should be applied in all cases, even if all other circumstances point to a close connection between the employment contract and another country?

Even when this question concerned the relationship between Article 6(2)(a) and the final part of the sentence of Article 6(2) of the 1980 Rome Convention, the Court's reply to this question is also of importance for the relationship between Article 8(2) and Article 8(4) Regulation 593/2008.[81]

---

[80] Case C-64/12 (ECLI:EU:C:2013:551).

[81] Conclusions of Advocate-General Wahl in Case C-64/12 *Schlecker* (ECLI:EU:C:2013:241).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

In its judgment,[82] the Court confirmed that first the applicable law should be determined by reference to the specific connecting factor of the place where the employee 'habitually carries out' his work (the Netherlands). However, where it is apparent from the circumstances as a whole that the employment contract is more closely connected with another country (Germany), it is for the national court to disregard the connecting factor of the place where the worker 'habitually carries out' his work and to apply the law of that other country. The court called upon to rule in a particular case cannot automatically conclude that the law of the country where the work is 'habitually carried out' must be disregarded solely because, by force of their number, the other relevant circumstances which have been brought to its knowledge would result in the selection of another country. On the contrary, the court must take into account the weight of those circumstances and single out one or more as being the most significant in determining the centre of gravity of the employment relationship. Among the significant factors suggestive of a connection with a particular country, account should be taken in particular of the country in which the employee pays income taxes and the country in which he is insured by a social security scheme and pension, sickness and invalidity schemes. In addition, importance must also be attached to the question which agreement or national scale has been used in determining the salary and other working conditions.

In practice this means that the result of the rules determining the applicable social security legislation, laid down in Regulation 883/2004, could have an impact on the application of the rules determining the applicable labour law, laid down in Regulation 593/2008.

The prevailing principle in matters of affiliation to a social security scheme is the *lex loci laboris*: the worker is subject to the social security legislation of the country where he works. According to this rule, Ms Boedeker should have been subject to Dutch social security legislation. In reality, however, she was subject to the social security legislation of Germany, because the competent German and Dutch authorities had concluded an agreement, as referred to in Article 16 Regulation 883/2004. As has been said above, Member States have a wide discretion in using Article 16. It is not known from the available documents on whose request this agreement had been concluded, but, as has been pointed out above, even a formal 'mutual' request by employer and employee for such an agreement is not a guarantee that the agreement is in the interest of the worker. The risk of pressure from the employer on the employee is not excluded. However, in its judgment the Court does not seem to attach any importance to this risk, contrary to the opinion of the Advocate-General.[83] As we have seen in Section III.v., in some cases the employer imposes on the worker a 'mutual request' for applying Article

[82] Case C-64/12 (ECLI:EU:C:2013:551).

[83] Advocate-General in Case C-64/12, (ECLI:EU:C:2013:241)[68]. However, the Advocate-General gives the impression that a mutual request by employer and worker constitutes a guarantee that the application of Article 16 Regulation 883/2004 would be in the interest of the worker, *quid non* (see above III.v.).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

16 Regulation 883/2004. The *Schlecker* judgment[84] could have as a result that the employer, by doing so, could influence the determination not only of the applicable social security legislation, but also of the 'objectively applicable' labour law.

IV.iii The 'Objectively Applicable' Law for Workers Making Use of their Right to Free Movement

The criterion of the country in which the employee 'habitually carries out' his work, laid down in Article 8(2) Regulation 593/2008 must be given a broad interpretation. It refers to the place in which or from which the employee actually performs his working activities and, in the absence of a centre of activities, to the place where he performs the majority of his activities. There is no doubt that on the basis of this criterion, the 'objectively applicable' law for a worker who has made use of his right to free movement and who has concluded an employment contract with an employer established in another Member State in order to work there, will be the law of the host State. This means that the employment contract will in principle[85] be governed by the law of the host State where the work is actually performed. In fact, for such workers (including frontier workers) the host State is the State where the work is 'habitually carried out'. Such workers are entitled to equal treatment as national workers in respect of any conditions of employment and work. Any clause of a collective or individual agreement which violates this rule is null and void.

IV.iv The 'Objectively Applicable' Law for Workers who are Temporarily Posted to Another Member State

Workers who perform work for their employer in another Member State only on a temporary basis are not to be considered as workers who 'habitually carry out' work in the host State. This is true in particular for workers who are employed by an employer established in a Member State and who are temporarily sent by that employer to another Member State to provide services. Article 8(2) Regulation 593/2008 stipulates explicitly that the country where the work is habitually carried out shall not be deemed to have changed if the worker is temporarily employed in another country. Posted workers continue to be subject to the law of the sending State. As we have seen, the Court has held[86] that posted workers are not workers within the meaning of Article 45 TFEU.[87] They cannot invoke the equal treatment principle. Under Article 45 TFEU the

---

[84] The judgment is criticised in literature. See, for instance Fieke van Overbeeke, *Rechtskundig Weekblad* [2013] 26 1035–1037 and the publications of the authors referred to in her article.

[85] Unless the worker and employer have decided that the employment contract will be governed by the law of another country. For such cases the situation referred to by Article 8(1) Regulation 593/2008 applies. It is also possible that it appears from the circumstances as a whole that the contract is more closely connected with another country (Article 8(4) Regulation 593/2008).

[86] Case C-49/98 *Finalarte* [2001] ECR I-07831 [21]–[23].

[87] This case law has been criticised in literature; see in particular Herwig Verschueren, 'Cross-border Workers in the European Internal Market: Trojan Horses for Member States'

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

worker is protected against any discrimination regarding working conditions. Under Article 56 TFEU it is the service provider – the employer of the posted worker – who is protected against discrimination (direct or indirect) in the host State. A Member State may not make the provision of services in its territory subject to rules which are liable to prohibit, impede or render less attractive the provision of services to the extent that it involves expenses and additional administrative and economic burdens.[88]

All this means that the application of the labour law of the host State could in principle be seen as an obstacle to the freedom to provide services. In fact, this freedom, as one of the fundamental principles of the Treaty, may be restricted only by rules justified by overriding requirements relating to the public interest and applied in a non-discriminatory and proportionate way, in so far as that interest is not safeguarded by the rules to which the service provider is subject in the Member State of establishment.[89] The overriding reasons relating to the public interest which have been recognised by the Court include[90] the protection of workers.[91] It became gradually clear from the case-law of the Court that Community law did not preclude a Member State from requiring an undertaking established in another Member State providing services in the territory of the first State to apply to its workers certain provisions of its labour law. However, the Court made this subject to the condition that there was a balance between the administrative and economic burdens that such provisions impose on providers of services and the increased social protection that they confer on posted workers compared with that guaranteed by the law of the country where their employer is established.[92]

IV.v Directive 96/71 Guaranteeing Minimum Protection

IV.v.a Introduction

This case-law is now enshrined in Directive 96/71.[93] This directive lays down a nucleus of mandatory rules for minimum protection to be observed in the host State by employers who post workers to perform temporary work in the Member State where

---

Labour and Social Security Law?' (2008) 24(2) *International Journal of Comparative Labour Law and Industrial Relations* 167–199. The Court has actually not always been consistent on this point. Employees of agencies for the supply of manpower, e.g., may in certain circumstances be covered by Article 45 TFEU and Regulation 492/2011, Joined Cases C-307/09 to 309/09 *Vicoplus* [2011] ECR I-00453. In its judgment in Joined Cases C-611/10 and 612/10 (*Hudzinski and Wawrzyniak*) the Court referred to Article 45 TFEU in relation to posted workers.

88 Cases 62 and 63/81 *Seco* [1982] ECR 00223; Case C-165/98 *Mazzoleni* [2001] ECR I-02189; Case C-164/90 *Portugaia* [2002] ECR I-00787.

89 Case 279/80 *Webb* [1981] ECR 03305.

90 In Case C-272/94 *Guiot* [1996] ECR I-01905 [21], the Court stated even that social protection of workers constituted the *only* consideration of public interest capable of justifying restrictions on the freedom to provide services.

91 Case 279/80 *Webb* [1981] ECR 03305; Joined Cases C-369/96 and C-376/96 *Arblade* [1999] ECR I-08453; Case C-164/99 *Portugaia* [2002] ECR I-00787.

92 Cases 62 and 63/81 *Seco* [1982] ECR 00223; Case C-272/94 *Guiot* [1996] ECR I-01905; Case C-164/99 *Portugaia* [2002] ECR I-00787; Case C-341/02 *Commission v Germany* [2005] ECR I-02733.

93 Directive 96/71 of 16 December 1996 [1997] OJ L 18.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

the services are provided, even when the employment contract between the worker and his employer is governed by the law of another State. The hard core of rules, to be laid down by law or by collective agreements which have been declared universally applicable within the meaning of the directive, concern matters[94] which are enumerated in Article 3(1) of the directive.

The rules provided for by Regulation 593/2008 for determining the applicable law offer a general framework, whereas Directive 96/71 specifically concerns the situation of posted workers and is thus able to refine this legal framework.[95] Article 3(1) Directive 96/71 could be seen as constituting a specific expression of 'overriding mandatory provisions' within the meaning of Article 9 Regulation 593/2008.[96] In any case, Regulation 593/2008 itself stipulates[97] that this regulation shall not prejudice the application of Directive 96/71. In other words, Directive 96/71 prevails. The directive in no way seeks to amend the law applicable to the employment contract, but it lays down a number of mandatory rules to be observed during the period of posting in the host State, 'whatever the law applicable to the employment relationship'.

The directive provides not only a significant level of protection for posted workers, it also aims at protecting workers of the host State by preventing social dumping[98] and to promote a climate of fair competition between all service providers, including those established in the host State. The last objective has been explicitly recognised by the Court,[99] whereas in its initial case-law[100] it had ruled that measures forming a restriction on the freedom to provide services could not be justified by economic aims such as the protection of local businesses.

Directive 96/71 does not impose the labour law of the host State as such, but only the hard core of rules concerning matters enumerated in the exhaustive list of Article 3(1) – the so-called nucleus. By virtue of Article 3(7) Directive 96/71, the application of this

---

[94] Such as: maximum work periods and minimum rest periods, minimum rates of pay and minimum paid annual holidays; health and safety at work, equality of treatment between men and women and other provisions on non-discrimination.

[95] In his conclusions in Case C-396/13 (*Elektrobudowa*) Advocate-General Wahl examines in detail the underlying rationale of the directive and the objectives it seeks to achieve. In this context he talks about the 'paradox' in Directive 96/71.

[96] See Commission Communication 2003/458, point 2.3.1.1, and Conclusions of Advocate-General Trstenjak in Case C-319/06. When Directive 96/71 was adopted, the general framework for determining the applicable law was contained in the 1980 Rome Convention. It is therefore logical that both the Advocate-General and the Commission Communication refer in this respect to Article 7 of the Rome Convention. In 2009 the Rome Convention was replaced by Regulation 593/2008. The notion 'overriding mandatory provisions' used in Article 9 of Regulation 593/2008 seems to correspond to the 'mandatory rules' referred to in Article 7 of the 1980 Rome Convention: see Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM/2002/654 final, point 3.2.8.1: 'The concept of mandatory provisions covers a multiform reality.'

[97] Article 23 and recital 34.

[98] Case C-244/04 *Commission v Germany* [2006] ECR I-00885.

[99] Case C-60/03 *Wolff and Müller* [2004] ECR I-09553; Case C-341/05 *Laval* [2007] ECR I-11767.

[100] Case C-49/98 *Finalarte* [2001] ECR I-07831; *Portugaia* [2002] ECR I-00787.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

nucleus of labour law of the host Member State does not prevent 'application of terms and conditions of employment which are more favourable to workers'. For a long time it was uncertain whether this Article 3(7) referred to more favourable 'terms and conditions of employment' provided by the law of the sending State or to those provided by the law of the host State. Since the *Laval*[101] and *Rüffert*[102] judgments we know that Article 3(7) refers to the more favourable terms and conditions of employment provided by the law of the sending State and not to those provided by the law of the host State.

Article 3(10) Directive 96/71 offers Member States the possibility to impose, in a non-discriminatory way, on undertakings which post workers to their territory their mandatory rules in matters other than those enumerated in Article 3(1), in the case of 'public policy' provisions. However, it follows from the case-law of the Court[103] that the public policy exception is to be seen as a derogation from the fundamental principle of freedom to provide services which must be interpreted strictly.[104] The scope of the notion 'public policy' cannot be determined unilaterally by the Member States. The mere fact that national labour law rules are categorised as public-order legislation, even when these rules foresee criminal penalties for infringement, does not mean that they are exempt from compliance with the provisions of the Treaty guaranteeing freedom to provide services.[105] It follows that Article 3(10) Directive 96/71 may be relied on only if there is a genuine and sufficiently serious threat to a fundamental interest of society.[106] Article 3(10) does not allow host States to oblige cross-border service providers to respect virtually all their mandatory labour law provisions.

The *Laval*, *Rüffert* and *Commission v Luxembourg* judgments have substantially limited the freedom of the host Member State to impose standards higher than the requisite minimum, i.e. the aforementioned nucleus. This case-law has been strongly criticised and has fuelled an intense debate in literature on the consequences of the freedom to provide services for workers' rights and the rights of trade unions to protect those rights in cross-border situations. The controversy has not stopped after the adoption of Directive 2014/67 (see below).

IV.v.b Notion of 'posted worker'

Compared with the rules laid down in Regulation 883/2004, the definition of 'posted worker' laid down in Directive 96/71 is rather vague. According to its Article 2(1), 'posted worker' means a worker who for a limited period carries out his work in the territory of a Member State other than the State where he normally works. Read in combination with Article 1(1) and 1(3) a worker qualifies as 'posted' within the

---

101 *Laval* (note 99) [79]–[81].

102 Case C-346/06 *Rüffert* [2008] ECR I-01989 [32]–[34].

103 Case C-319/06 *Commission v Luxembourg* [2008] ECR I-04323.

104 According to Catherine Barnard the impact of the dicta of the Court in Case C-319/06 (see previous note) was to interpret Article 3(10) 'almost out of existence': 'The UK and Posted Workers: The Effect of Commission versus Luxembourg on the Territorial Application of British Labour Law' (2009) 38(1) *Industrial Law Journal* 122–132.

105 Judgment of 23 November 1999, Joined Cases C-369/96 and C-376/96, Case C-376/96 *Arblade* [1999] ECR I-08453.

106 Case C-319/06 *Commission v Luxembourg* [2008] ECR I-04323.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

meaning of Directive 96/71 by virtue of his factual situation and the circumstances in which he is expected to carry out his activities, including:

- the temporary nature of the activities to be performed;
- the existence of a direct employment relationship between the undertaking and the worker during the whole period of posting;
- the country in which the worker normally works;
- the existence of a genuine link between the employer and the worker's country of origin.

The directive does not contain any further indication as to how to determine whether the employer is established in a Member State, nor does it contain more specific criteria as to how to determine the temporary nature of the work to be performed by the posted worker or the Member State in which the workers concerned 'normally work'. In practice, this has led to several problems with implementation, application and enforcement. Competent authorities in the Member States, service providers and posted workers themselves often face unclear situations where it appears difficult to determine whether there is a posting within the meaning of the directive or not. There seems also to be evidence[107] of abuses committed by employers exploiting insufficient clarity of the legal provisions in order to circumvent the applicable rules.

In order to avoid such circumvention of the rules and combat abuse of the application of Directive 96/71, the Commission presented in 2012 a proposal[108] for a directive on the enforcement of this directive. This proposal has been the subject of heated discussions in Council and Parliament and has been amended on several points. In spring 2014 Council and Parliament reached an agreement on the proposal by adopting Directive 2014/67.[109]

Article 4(3) of this directive stipulates that in order to assess whether a posted worker temporarily carries out his/her work in another Member State, all factual elements characterising such work and the situation of the worker have to be examined. It also contains a non-exhaustive list of constituent elements of the temporary nature, such as the fact that the work is carried out for a limited period of time in another Member State, the fact that the posting takes place to a Member State other than the one in which or from which the posted worker habitually carries out his work, the nature of activities and the fact that the employer provides or reimburses travel, board and lodging or accommodation. Several of these elements are inspired by the already existing requirements laid down in Regulations 883/2004 and 987/2009 in order to be considered as a posted worker within the meaning of the social security regulations. These elements are indeed likely to diminish the number of disputes in the future, but will probably not eliminate them either. Another element in the list of Article 4(3) Directive 2014/67 is whether the posted worker is expected to resume working in the Member State from which he is posted after completion of the work. This provision is

[107] See explanatory memorandum of the 2012 Commission proposal for a Directive on the enforcement of Directive 96/71.

[108] COM 2012/131 final.

[109] Directive 2014/67 [2014] OJ L 159.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

inspired by recital 36 of Regulation 593/2008. This means that the intention of the worker, as it appears from all the facts and circumstances, not to return to the sending State is, and continues to be, an important element for assessing whether or not he is a 'posted worker' within the meaning of Directive 96/71. This may in some cases be a tedious exercise.

In any case, Directive 2014/67 will not mean an end to the fact that a 'posted worker' within the meaning of Directive 96/71 is not necessarily also a 'posted worker' within the meaning of Regulation 883/2004, which has a strict maximum time limit. The strict time limit of the coordination regulation is missing in Directive 96/71, even after the transposition of Directive 2014/67 into national law.[110] This could lead to complications in cases of posting of duration longer than two years, where the work performed by the worker in the host State, which was initially meant to be temporary, gradually takes on a more permanent character. In such cases, disputes could arise about the question whether the worker is still a 'posted worker' within the meaning of Directive 96/71. The consequences of the assessment are huge. In fact, if indeed it is established, on the basis of all relevant facts and circumstances, that the work performed by the worker in the host State is no longer of a temorary basis, the 'objectively applicable' law will be the law of the host State, since it is this State where he is now considered to 'habitually carry out' his work.[111] Now he is considered a worker who has made use of his right to free movement within the meaning of Article 45 TFEU and will be entitled to treatment equal to that of national workers in respect of any conditions of employment and work.

IV.vi Intermediate Conclusions

Unless it appears from the circumstances as a whole that the employment contract is more closely connected to another State, the 'objectively applicable' law for workers who make use of their right to free movement is the law of the host State where the work is actually performed. In fact, for such workers the host State is the State where the work is 'habitually carried out'. Such workers are entitled to treatment equal to that of national workers in respect of any conditions of employment and work. Any clause of a collective or individual agreement which violates this rule is null and void.

However, for posted workers, i.e. workers who are employed by an employer established in a Member State and who are temporarily sent by that employer to another Member State to provide services, the 'objectively applicable' law is the law of the sending State.[112] The notion of 'posted worker' within the meaning of Directive 96/71 differs from that laid down in Regulation 883/2004. Contrary to Regulation 883/2004, Directive 96/71 does not stipulate a strict time limit, sometimes leading to complicated cases. Directive 96/71 in no way amends the law applicable to the employment contract, but only lays down a hard core of clearly defined protective rules

[110] Member States have to comply with this Directive by 18 June 2016.

[111] Unless, of course, it appears from the circumstances as a whole that the contract is more closely connected with another State (see Section IV.ii.b.).

[112] Unless, of course, it appears from the circumstances as a whole that the contract is more closely connected with another State.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

that must be observed by the service provider notwithstanding the duration of the worker's posting. The application of the labour law of the host State in matters not listed in Article 3(1) can be seen as an obstacle to the freedom to provide services. This freedom may be restricted only by rules justified by overriding requirements relating to the public interest and applied in a non-discriminatory and proportionate way, in so far as that interest is not safeguarded by the rules to which the service provider is subject in the Member State of establishment.[113] It is incumbent on the host State to use the rule of reason to show that applying labour law of the host State is proportional and justified in the public interest.

V. PROBLEMS RESULTING FROM DIVERGING RULES DETERMINING THE APPLICABLE LEGISLATION

When a worker crosses an internal frontier within the Union in order to perform work in another Member State, he might be in a better or in a worse situation as regards his working conditions and his social protection. This is not, as such, incompatible with the Treaty.[114] In fact, there is hardly any Union law harmonising Member States' social systems. The more or less advantageous or disadvantageous situation for the worker can be seen as a logical consequence of the fact that Member States' systems in these fields are not harmonised.

For cross-border workers the situation becomes slightly more complicated when a branch of social protection, such as income compensation in case of sickness, is in some Member States dealt with primarily in labour law and only by way of a safety net in social security, whereas in other Member States this risk is (almost) exclusively governed by social security legislation. For instance, when a worker in the Netherlands is unable to perform his work due to sickness, the employer has, by virtue of Dutch law, the obligation to continue to pay at least 70 per cent of the wage during the first two years of the sickness. In other words, only in a very limited number of cases, by way of a safety net, could the worker be entitled to a statutory sickness benefit. This safety net is aimed at people for whom the obligation of the employer to continue to pay the salary does not apply.[115] As we have seen above the continued payment of wages to the sick worker is qualified as a 'sickness benefit' within the meaning of the social security regulations.

Contrary to the Netherlands, in Belgium the obligation of the employer to continue to pay wages is limited to a period of one month. After that period, the worker is

---

[113] Case C-319/06 *Commission v Luxembourg* [2008] ECR I-04323 [43].

[114] As regards social security, this has been underlined by the Court in Joined Cases C-393/99 and C-394/9 *Hervein* [2002] ECRI-02829; Case C-68/99 *Commission v Germany* [2001] ECR I-01865; Case C-493/04 *Piatowski* [2006] ECR I-02369; Case C-208/07 *von Chamier* [2009] ECR I-06095; Case C-3/08 *Leyman* [2009] ECR I-09085; Case C-345/09 *Van Delft* [2010] ECR I-9879; Case C-443/11 *Jeltes* (ECLI:EU:C:2013:224).

[115] For instance because an employment contract no longer exists, such as unemployed workers who become unable to work because of sickness or people whose employment contract expires during sickness.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

entitled to a sickness benefit[116] for a maximum period of one year. The amount of this sickness benefit is limited to 60 per cent of the (capped) wage. After the end of that period, if the worker is still incapable of work, he will receive an invalidity allowance.

This difference in legislation between Belgium and the Netherlands will not cause problems, as long as Regulations 593/208 and 883/2004 determine the same legislation as being applicable. A Dutch worker, for instance, who resides in the Netherlands, but who works as a frontier worker in Belgium, will be subject to Belgian legislation, both for social security and for labour law. Likewise, a Belgian worker who is posted by his Belgian employer for a period of less than two years in the Netherlands will normally be subject to Belgian social security legislation by virtue of Article 12 Regulation 883/2004. Belgian law will normally also be the 'objectively applicable' law for labour law.[117] In case of sickness, this worker will be entitled to continue to receive his salary from his Belgian employer for a period of one month and after that he will receive a Belgian sickness benefit.

However, problems can arise as a result of diverging rules determining the applicable legislation. As we have seen above, the EU rules determining the applicable social security legislation differ on several points from the EU rules determining the applicable labour law. This can lead to cross-border situations where a worker is subject to the social security legislation of Member State A and to labour law of Member State B. Workers who normally pursue an activity in two (or more) Member States as well as workers who are posted for a period longer than two years are easily confronted with this situation.

The following examples will illustrate the kind of difficulties a cross-border worker has to face when the EU rules in the fields of labour law and social security lead to the applicability of different national laws.

V.i Workers who Normally Work in Two (or More) Member States

V.i.a Workers having one employer

Let us start with the simple example of a worker who resides in the Netherlands but works for his employer, established in Belgium, for two days in the Netherlands and three days in Belgium. He is subject to Dutch social security, whereas Belgian law will probably be the 'objectively applicable' law within the meaning of Article 8 Regulation 593/2008,[118] since he performs the majority of the activities in Belgium.[119] If the worker falls ill, he will continue to receive his wage from his Belgian employer, but only for a period of one month. But what will happen after this month? His claim for a Belgian sickness benefit will be refused, since the worker is not subject to Belgian social security legislation. He turns to the Netherlands institution claiming a Dutch sickness benefit. This claim will also be refused by the Dutch authorities. As said

---

[116] The terminology of the Belgian law is 'primary incapacity allowance'.

[117] Unless it appears from the circumstances as a whole that the employment contract is more closely connected to the Netherlands.

[118] Unless, of course, it appears from the circumstances as a whole that the contract has a closer connection with the Netherlands.

[119] Case C-29/10 *Koelzsch* [2011] ECR I-01595.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

before, in the Netherlands the responsibility for income compensation in case of sickness of the worker has been shifted to the employer. The Dutch authorities will say that the (Belgian) employer has to continue to pay at least 70 per cent of the salary to the worker for a maximum period of two years. Only if there is no longer any employer can the social security institution intervene.[120] However, the Belgian employer will probably argue that Dutch law cannot impose on him an obligation to continue to pay at least 70 per cent of the salary for a maximum period of two years, for which obligation no legal basis exists in Belgian law, which is the applicable legislation in accordance with Regulation 593/2008. The Dutch authorities will react by saying that Dutch law is the applicable one by virtue of Regulation 883/2004. The worker concerned is not in an enviable position. It is actually surprising that this practice of the Dutch social security institutions has, until now, not been challenged before national and European judiciaries.

Could a claim for the continued payment of at least 70 per cent of his salary by his Belgian employer be successful?

The worker could argue that, despite the fact that he 'habitually carries out' his work in Belgium, there is a closer connection between the employment contract and the Netherlands, leading to Dutch law governing the employment contract. However, taken into account the significant factors indicated by the Court in its *Schlecker* judgment, it is doubtful whether this claim would be successful. True, he pays his social security contributions in the Netherlands, but he pays taxes over the major part of his income (60 per cent) in Belgium. The parameters relating to the other working conditions might also refer to Belgian law.

Could he challenge the refusal by the Dutch authorities to grant him a sickness benefit?

There is no doubt that Regulation 883/2004 applies to schemes relating to the obligations of an employer. Member States are free to organise their own social security systems, including the allocation of responsibilities for granting benefits. However, when exercising that power they have to comply with Union law.[121] The refusal of a Dutch sickness benefit is based on the assumption that the worker should get the continued payment of at least 70 per cent of the wage from the Belgian employer. The employer has to respect the social security legislation of the Netherlands, such as the payment of social security contributions due under Dutch law. This is true even when the employer is established in another Member State.[122] But would it not go beyond a coordination of social security if the application of the EU rules determining the applicable social security legislation resulted in intervening in the rights and obligations between employer and worker even in cases where there is no strong link between the employment contract and the Netherlands? The fundamental

---

[120] Saskia Klosse and Wilfried Rauws, 'Arbeidsrechtelijke aspecten van grensoverschrijdend werken', in H Verschueren (ed), *Werken over de grens België Nederland* (Intersentia 2011) 82–87. In its case law the judiciary in the Netherlands has given a restrictive interpretation to Article 29(2) Ziektewet: ECLI: NL: CRVB: 2010: BN 2808 and 2809.

[121] Case C-227/03 *Van Pommeren* [2005] ECR I-06101; Case C-212/06 *Walloon government v Flemish government* [2008] ECR I-01683; Case C-228/07 *Petersen* [2008] ECR I-06989.

[122] Article 21(1) Regulation 987/2009.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

question arises whether Union law precludes the application of Dutch legislation according to which a claim for Dutch sickness benefit is refused in all cases where an employment contract exists, even when there is not a sufficiently strong link between the Netherlands and the employment contract.

Identifying the Member State that has the closest connection with the employment contract is precisely the objective of Article 8 Regulation 593/2008. The rules laid down in Regulation 593/2008 guarantee that the obligation of the employer to continue to pay at least 70 per cent of the wage if one of his workers is unable to work because of sickness only exists where the Netherlands is the Member State having the closest connection with the relevant employment contract. In such cases the employer is, without any doubt, required to continue to pay at least 70 per cent of the wage to the worker for a maximum period of two years in the situation where the worker falls ill. In cases where Dutch labour law is not applicable by virtue of Regulation 593/2008, it is doubtful whether the Dutch institutions are allowed to refuse a sickness benefit to a worker by referring to the obligation of the employer to continue to pay at least 70 per cent of the salary, as foreseen by Dutch legislation, applicable by virtue of Regulation 883/2004. In the *De Paep* judgment[123] the Court underlined that the social security regulations do not contain conflict rules concerning the legislation applicable to the employment relationship existing between worker and employer. If indeed Belgium is the Member State having the closest connection with the contract between the employer and the worker, the obligations of the employer towards his workers are, in accordance with Regulation 593/2008, governed by Belgian and not Dutch law. In such situations, the social security legislation of the Netherlands, being competent in social security matters, cannot unilaterally shift the responsibility for social protection of a person covered by its system, either to the institution of another Member State, or to a private party (employer) bound by labour law of another Member State. The question seems to be legitimate whether such a shift would in these circumstances be compatible with the mandatory character of the EU rules determining the applicable legislation in social security.

In this context we should not forget that the objective of the provisions laid down in Article 13 Regulation 883/2004 for workers normally working in two or more Member States is not to identify the Member State having the closest connection with the employment contract(s). On the contrary, the application of Article 13 leads to situations where a worker is subject to the social security legislation of a Member State having no connection at all with the employment contract(s)! A worker, for instance, who resides in the Netherlands and who works two days a week for one employer in Germany and three days a week for another employer in Belgium is by virtue of Article 13(1)(b)(iv)[124] subject to the social security legislation of the Netherlands, a Member State where he does not work at all.

---

[123] Case C-196/90 *De Paep* [1991] ECR I-04815 [13]. In this context it is important to remember that already at that time Regulation 1408/71 stipulated in its Article 4(2) that it applied to 'schemes concerning the liability of an employer or ship owner in respect of the benefits referred to in paragraph 1'.

[124] As modified by Regulation 465/2012 of 22 May 2012 [2012] OJ L 149.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

Moreover, as the Court has underlined,[125] in making employed persons who pursue a professional activity in two Member States subject, with respect to the whole of their activities, to a single social security system, Regulation 883/2004 pursues a general objective which is to ensure free movement of workers and seeks to guarantee the equality of treatment of all workers employed in the territory of a Member State as effectively as possible and not to penalise workers who exercise their right to free movement. The Dutch provision leading to a refusal of a Dutch sickness benefit to the worker concerned after having received a continued payment of his employer for a limited period of one month is liable to hamper or to render less attractive the exercise of the fundamental freedom of movement of workers guaranteed by the Treaty. In its case-law the Court has underlined that while Member States are free to determine their own social security systems, they are nevertheless required to respect the spirit and principles of the regulations based on Article 48 TFEU, namely to ensure that a person is not penalised for exercising his right to free movement.[126] In its case-law the Court has not hesitated to declare the application of a provision of national law that hampers the exercise of free movement of workers incompatible with Articles 45–48 TFEU.[127] Where the application of national legislation to a migrant worker in the same way as to a non-migrant worker leads to consequences incompatible with Articles 45–48 TFEU, the national authorities should interpret their own legislation in the light of the aims of Articles 45–48 TFEU and, as far as possible, prevent their interpretation from discouraging a migrant worker from actually exercising his right to freedom of movement. Where application in accordance with those requirements is not possible, the national authorities must fully apply Union law and protect the rights conferred on individuals, and where necessary not apply any national provision which, in the circumstances of the case, leads to a result contrary to Union law.[128] This obligation for the Member States is a consequence not only of Articles 45–48 TFEU, but also of the principle of sincere cooperation laid down in Article 4(3) TFEU.[129] It seems to imply the assessment by the authorities of the Member States in each individual case of the result of the legislation in the light of the objectives of the Treaty.[130]

The mirror situation of the example may be less worrying for the worker. Let us assume that the worker resides in Belgium and that he works for one single employer established in the Netherlands. For this employer he works two days in Belgium and three days in the Netherlands. Since he pursues a 'substantial activity' in Belgium within the meaning of Article 14(8) Regulation 987/2009, he is subject to Belgian social security legislation. However, since the worker carries out the majority of his

---

[125] Case C-249/04 *Allard* [2005] ECR I-01513.

[126] Case C-103/06 *Derouin* [2008] ECR I-01853.

[127] Case C-228/07 *Petersen* [2008] ECR I-06989; Case C-212/06 *Walloon government v Flemish government* [2008] ECR I-01683; Case C-3/08 *Leyman* [2009] ECR I-09085.

[128] Case C-262/97 *Engelbrecht* [2000] ECR I-07321.

[129] Case C-165/91 *Van Munster* [1994] ECR I-04661; and *Engelbrecht*, see previous note.

[130] Herwig Verschueren, 'The EU Social Security Coordination System, A Close Interplay between the EU Legislature and Judiciary', in P Syrpis (ed), *The Judiciary, the Legislature and the EU Internal Market* (Cambridge University Press 2011).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

activities in the Netherlands, Dutch law will probably be the 'objectively applicable' law within the meaning of Article 8 Regulation 593/2008.[131] This means that if the worker falls ill, he will be entitled, in accordance with Dutch law, to continue to receive from his employer at least 70 per cent of his salary for a maximum period of two years.

The mere fact that the Court has qualified the continued payment of the salary by the employer to the worker in case of sickness as a social security benefit within the meaning of the coordination regulation does not seem to affect this conclusion. True, the worker is subject to Belgian social security and the exclusive effect of the determination of the applicable social security legislation is explicitly stipulated by Article 11(1). However, the fact that the worker is subject exclusively to Belgian social security does not remove the obligation of his employer, based on applicable labour law of the Netherlands, to continue to pay at least 70 per cent of the salary for a maximum of two years to his worker who is unable to work because of sickness. It would go beyond the objective of Regulation 883/2004 and exceed the purpose and scope of Article 48 TFEU to interpret that regulation as prohibiting a Member State from granting workers broader social protection[132] than that arising from the application of that Regulation.[133]

V.i.b Workers having two or more employers

It is important to keep in mind that Regulation 883/2004 determines the applicable social security legislation in its entirety. If, in accordance with these rules, a worker who performs activities in Member State A and in Member State B, is subject to the legislation of Member State B, he is covered by the social security schemes of that State, including for his activities performed in State A. On the other hand, the applicable labour law has to be determined for each individual employment contract.[134] If the worker performs two activities, one in Member State A for employer A and one in Member State B for employer B, it is likely that the employment contract concluded with the first employer is governed by labour law of Member State A and the second contract by the law of Member State B.

Let us take the example of a worker, residing in the Netherlands, who works in Belgium for three days a week for employer B, established in Belgium, and for two days a week in the Netherlands for employer A, established in the Netherlands. Since he performs a 'substantial part' of his overall activities in his country of residence, the Netherlands, he is covered by the social security schemes of the Netherlands. His employment contract concluded with his Dutch employer is probably governed by Dutch law and his employment contract with his Belgian employer by Belgian law. In

---

[131] Unless, of course, it appears from the circumstances as a whole that the contract has a closer connection with Belgium.

[132] Obviously, it is not possible for the worker to claim, in addition to his wage from his employer, sickness benefit from the Belgian social security institution, either on the basis of Belgian law (Article 103(1) Wet of 14 July 1994 *betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen*), or on the basis of Regulation 883/2004 (Article 10); see also Case C-102/91 *Knoch* [1992] ECR I-04341 concerning unemployment benefit.

[133] Case C-208/07 *Von Chamier* [2009] ECR I-06095; Joined Cases C-611/10 and 612/10 *Hudzinski* (ECLI:EU:C:2012:339).

[134] The heading of Article 8 Regulation 593/2008 is: 'Individual employment contracts'.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

case of sickness, there will be no problem as to the income compensation for his work performed in the Netherlands. He will continue to receive from his Dutch employer at least 70 per cent of his wage for a maximum period of two years. His Belgian employer will continue to pay his wage for one month only. After that period, he has to claim sickness benefit from the Dutch social security institution. He probably will be confronted with a refusal for the same reasons as indicated above where the same worker has only one employer. The same reasoning for challenging that refusal as indicated above could be followed here.[135]

If the same person works in Belgium for four days a week for an employer established in Belgium, and for one day a week for an employer established in the Netherlands, he will be covered not by Dutch, but by Belgian social security. As in the previous example, his employment contract concluded with his Dutch employer is probably governed by Dutch law and his employment contract with his Belgian employer by Belgian law – nothing changes. In the event of sickness, he will continue to receive from his Dutch employer at least 70 per cent of his Dutch wage for a maximum period of two years.[136] His Belgian employer will continue to pay him his Belgian salary for a period of one month. Normally this should be immediately followed by a Belgian sickness benefit. In Belgium sickness benefits are calculated on the basis of previously earned wages. By virtue of Article 13(5) Regulation 883/2004, a person who pursues professional activities in two Member States is, with respect to the whole of their activities, subject to the social security legislation of a single Member State, which is in this case Belgium. This means that normally the Belgian sickness benefit should be based on the sum of the wages earned by the worker in the Netherlands and in Belgium together. However, by virtue of Belgian legislation[137] a sickness benefit cannot be granted if the worker is entitled to a wage over the same period. In our opinion, the Belgian institution could not use this provision laid down in Belgian law to refuse the worker the payment of any Belgian sickness benefit. In its case-law the Court has emphasised that while Member States are free to organise their own social security systems, they are nevertheless required, in exercising that power, to respect Union law. The application of the provision in Belgian law leading to a refusal of any Belgian sickness benefit for the sole reason that the worker continues to receive, for a (very) small part of his work, a continued payment of his salary, is liable to hamper or to render less attractive the exercise of the fundamental freedom of movement of workers guaranteed by Articles 45–48 TFEU. For challenging the refusal of a Belgian sickness benefit the same reasoning could be followed as for challenging the refusal of a Dutch sickness benefit (indicated above in Section V.i.a.). The obligation to grant a Belgian sickness benefit to the worker concerned, even if the Dutch employer continues to pay at least 70 per cent of the Dutch wage during

[135] Since the worker continues to receive at least 70% of his salary from his Dutch employer, the Dutch institution is allowed to restrict the amount of the Dutch sickness benefit by compensating only the loss of income earned with the Belgian employer, in line with Article 10 Regulation 883/2004 (see also Case C-102/91 *Knoch* [1992] ECR I-04341 concerning an unemployment benefit).

[136] See also Section V.i.a.

[137] Article 103(1) Wet 14 juli 1994 betreffende de verplichte verzekering voor geneeskundige verzorging en uitkeringen and Article 241(1) Royal Decree 3 July 1996.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

the sickness is a consequence not only of Articles 45–48 TFEU, but also of the principle of sincere cooperation laid down in Article 4(3) TFEU. However, the Belgian institution would be allowed to deduct the amount of the wage received by the Dutch employer from the sickness benefit due by the Belgian institution, in line with Article 10 Regulation 883/2004.[138]

V.ii Workers Posted for More than Two Years

Such workers are no longer considered as 'posted workers' within the meaning of Article 12 Regulation 883/2004. A Belgian worker, for instance, who is posted by his Belgian employer to the Netherlands, is, after the expiration of the maximum period of two years, subject to the social security legislation of the Netherlands. However, Belgian labour law will probably still be the 'objectively applicable' law by virtue of Article 8 Regulation 593/2008.[139] In case of sickness the worker will continue to receive his wage from his Belgian employer for the first month. But what will happen after this month? His claim for a Belgian sickness benefit will be refused, since the worker is not subject to Belgian social security legislation. His claim for Dutch sickness benefit will also be refused in view of the obligation of the employer, under Dutch law, to pay sick pay. The Belgian employer will probably argue that no legal basis for such obligation exists in Belgian law, which is, in accordance with Regulation 593/2008, the applicable legislation. Could the worker's claim for the continued payment of at least 70 per cent of his salary by his Belgian employer be successful?

This depends on the specific circumstances of the case.[140] If the worker could bring forward facts and circumstances showing that he no longer had the intention of going back to Belgium to work after the completion of the services for which he was posted,[141] he could argue that having worked in the Netherlands for more than two years, he had established the effective centre of his working activities[142] in the Netherlands and that this State had become the State where he 'habitually carries out' his work within the meaning of Article 8(2) Regulation 593/2008.[143] This argument would be even stronger if, before having been sent to the Netherlands, he had worked only for a limited period of time in Belgium. Even if the parties had written in their employment contract that Belgian labour law would be the applicable law, the worker could in such circumstances successfully demand the continued payment of his wage

---

[138] This would also be in line with Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak* (ECLI:EU:C:2012:339)[76]–[85] concerning family benefits.

[139] See Section IV.v.b.

[140] Saskia Klosse and Wifried Rauws, 'Arbeidsrechtelijke aspecten van grensoverschrijdend werken', in H Verschueren (ed), *Werken over de grens België-Nederland*' (Intersentia 2011) 85–86.

[141] See Section IV.v.b.

[142] Case C-383/95 *Rutten* [1997] ECR I-00057; Case C-29/10 *Koelzsch* [2011] ECR I-01595.

[143] Saskia Klosse and Wilfried Rauws, 'Arbeidsrechtelijke aspecten van grensoverschrijdend werken', in H Verschueren (ed), *Werken over de grens België-Nederland* (Intersentia 2011) 86.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

from his employer, thanks to Article 8(1) Regulation 593/2008.[144] The Belgian employer would be obliged to continue to pay at least 70 per cent of the salary to the worker for a maximum period of two years and he would be bound in fact and in law by the medical findings made by the social security institution of the Netherlands concerning the commencement and duration of the incapacity for work, when he has not made use of his right[145] to have the worker examined by a doctor of his own choice. In its famous *Paletta* judgment,[146] the Court ruled that the employer, who continues to pay the salary in case of sickness of the worker, has to be treated as the 'competent institution' within the meaning of the EU regulations on social security.[147]

If the worker is not able to produce facts and circumstances showing that he did not have the intention to return to Belgium after the completion of his work in the Netherlands, he could use another way to try and claim the continued payment of his salary by his Belgian employer. If, notwithstanding the fact that he 'habitually carries out' his work in Belgium, the worker can produce facts and circumstances showing that there is a closer connection between the employment contract and the Netherlands, then Dutch labour law should be applied by virtue of Article 8(4). In its *Schlecker* judgment, the Court identified as one of the more significant factors for this assessment the country where the worker pays his income taxes and social security contributions and where he is insured for pension, invalidity and sickness schemes. In this case, the worker pays his social security contributions in the Netherlands and is insured in the Netherlands for old age, invalidity and sickness schemes. In addition, he probably pays his income tax in the Netherlands.[148] There may also be further circumstances pointing to a close connection between the employment contract and the Netherlands. In such cases, the EU rules determining the applicable legislation in the fields of labour law and social security converge again.

If, however, the worker is unable to produce facts and circumstances leading to the applicability of Dutch labour law, the fundamental question arises again whether Union law precludes the application of Dutch legislation according to which a claim for Dutch sickness benefit is refused in all cases where an employment contract exists, even when there is not a sufficiently strong link between the Netherlands and the employment contract. The same reasoning for challenging the refusal of a Dutch sickness benefit as indicated above under V.i.a. can be followed here. True, a posted worker is not a worker within the meaning of Article 45 TFEU, but he is nevertheless a person performing an 'activity as an employed person' within the meaning of Article 48 TFEU. In addition, the Court has underlined on several occasions that the purpose of the coordination

---

[144] See Section IV.i. Under the legislation of the Netherlands, the employer's obligation of continued payment of salary for a maximum period of two years when the worker falls ill cannot be derogated from by agreement within the meaning of Article 8(1) Regulation 593/2008.

[145] Article 27(5) and (6) Regulation 987/2009.

[146] Case C-45/90 [1992] ECR I-03423.

[147] This is now stipulated in Article 1(q)(iv) Regulation 883/2004.

[148] Article 15 of Treaty to avoid double taxation of 5 June 2001 between Belgium and the Netherlands.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

regulations is to promote not only freedom of movement of workers, but also freedom to provide services.[149]

VI. CONCLUSIONS

In many cases a migrant worker is subject to the social security legislation and to labour law of the same Member State. After all, the *lex loci laboris* is an important criterion used by conflict of law rules both in Regulation 883/2004 and Regulation 593/2008. However, such synchronism is no guarantee, since the conflict of law rules in both fields vary in their detail. In addition, they are based upon different principles.

In the field of social security, conflict of law rules are mandatory. The worker and his employer do not have the freedom to choose for themselves the applicable legislation. In order to ensure equal treatment of migrant and national workers, the *lex loci laboris*, namely the law of the country where the work is performed, is the main principle of the conflict of law rules. However, the application of this simple rule is not always possible or appropriate. A reference to *lex loci laboris* is not possible in situations where a worker normally pursues activities in two or more Member States. In addition, Regulation 883/2004 promotes not only free movement of workers, but also the freedom to provide services. The application of the *lex loci laboris* for determining the applicable social security legislation of posted workers is considered as inappropriate, since it would lead to cumbersome complications for service providers, posted workers and social security institutions. Therefore, several special rules have been created to deal with specific situations of cross-border employment, using criteria for the determination of the applicable legislation other than the place of work. Furthermore, Article 16 Regulation 883/2004 empowers Member States to provide, by common agreement, for exceptions to the conflict of law rules laid down in this regulation. Such agreements should be 'in the interest of' the workers concerned. Since there is not yet at Union level any clarification of this notion in either legislation or case-law, it is uncertain which criteria are used by the institutions of the various Member States to assess whether the agreement requested under Article 16 Regulation 883/2004 is indeed in the interest of the worker. In some cases, by putting pressure on the worker to make a 'mutual request' for applying Article 16, the employer may, in an indirect way, influence the determination of the applicable social security legislation. This is an undesirable phenomenon in itself, contrary to the spirit of Articles 45–48 TFEU. But the possible consequences of this phenomenon have become even worse after the *Schlecker* judgment according to which the result of the rules determining the applicable social security legislation could have an impact on the application of the conflict of law rules in labour law.

According to the letter of Regulation 883/2004, a migrant worker is subject to the social security legislation of one single Member State. However, a worker may also be covered by the social security legislation of a Member State other than the one designated by the regulation, if there is a 'close connection' between the non-competent

[149] Case C-202/97 *Fitzwilliam* [2000] ECR I-00883; Case C-56/01 *Inizan* [2003] ECR I-12403; Case C-145/03 *Keller* [2005] ECR I-02529; Case C-372/04 *Watts* [2006] ECR I-04325.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

Member State and the worker. If this condition is fulfilled, it follows from the case-law of the Court that the conflict of law rules laid down in the social security regulations cannot prohibit a Member State from granting a worker broader social protection than that arising from the application of the regulations.

In the field of labour law, the starting point is the freedom of the worker and his employer to choose the applicable law. However, the conflict of law rules have curtailed to some extent this freedom of choice to protect the worker, the latter being considered as the weaker party from a socio-economic point of view. In fact, the conflict of law rules guarantee that the worker cannot be deprived of the protection which he would enjoy under the mandatory rules of the 'objectively applicable law', namely the law of the country with which the employment contract is most closely connected. The criteria for determining the relevant country do not automatically result, in all cases, in the application of the law most favourable to the worker. In most cases the 'objectively applicable law' for workers who make use of their right to free movement is the law of the host State where the work is 'habitually carried out'. Such workers are entitled to treatment equal to that of national workers with respect to any conditions of employment. However, for posted workers the 'objectively applicable law' is usually the law of the sending State. Directive 96/71 aims to reconcile the exercise of companies' fundamental freedom to provide cross-border services with appropriate protection of posted workers and workers of the host State. To this end the directive lays down a number of mandatory rules to be observed during the posting period in the host State, even when the employment contract is governed by the law of the sending State. The notion of 'posted worker' within the meaning of Directive 96/71 differs from that laid down in Regulation 883/2004.

Due to the co-existence of different systems of conflict of law rules a mobile worker can be subject to the social security legislation of one Member State and to labour law of another Member State. Our analysis shows that this is especially true for posted workers who are posted for a period longer than two years and for workers who normally pursue an activity in two or more Member States.

For mobile workers and their employers the situation might become rather complicated when the EU rules in the fields of labour law and social security lead to the applicability of different national laws concerning the same subject, for instance the social protection of the worker in case of sickness. In fact, the obligation of the employer to continue to pay wages during sickness of the worker – an obligation imposed by legislation – falls under the scope of Regulation 883/2004. Such a continued payment of the salary is a 'sickness benefit' within the meaning of this regulation. On the other hand, it follows from the case-law of the Court that the social security regulations do not contain any conflict of law rule concerning the legislation applicable to the employment relationship between worker and employer. By giving some examples we have illustrated the kind of difficulties a mobile worker has to face in practice, when he is subject to the social security legislation of one Member State and to labour law of another State. We have argued that it would go beyond the coordination of social security if the application of the EU rules determining the applicable social security legislation were to result in intervening in the rights between employer and worker even in cases where there is no strong link between the employment contract and the competent Member State. In such situations the social

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

security legislation of the competent State cannot unilaterally shift the responsibility for social protection of a person covered by its system either to the social security institutions of another Member State or to an employer bound by labour law of another Member State. In our opinion, this would be incompatible with the mandatory character of the conflict of law rules in the field of social security.

We have explained that only by way of exception are elements of labour law also covered by Regulation 883/2004. This is due to the fact that three conditions must be fulfilled by a scheme for being covered by this regulation. Namely it must be a social security scheme, it must be statutory and it must concern one of the branches explicitly mentioned in an exhaustive list. The second condition means that the overwhelming majority of occupational schemes are excluded from the scope of the aforementioned regulation, because they are not statutory. In fact, Regulation 883/2004 applies a very formal criterion to determine its material scope. The decisive criterion is whether or not the source of the social security scheme is legislation. The third condition has as a result that the overwhelming majority of activation measures are not covered either. In fact, the rather old-fashioned approach of the notion 'unemployment benefit' in Regulation 883/2004 means that benefits in kind aimed at (re)integrating unemployed people into the labour market or at improving the employability and adaptability of workers are not covered. Neither does this regulation apply to benefits in cash which do not satisfy the criteria indicated by the Court in order to be considered 'unemployment benefits' within the meaning of the regulation, such as bonuses to promote the employment of different target groups.

This does not mean, however, that migrant workers are not protected at all in these matters. On the contrary, the way national activation measures are applied should comply with the EU legal framework on free movement of workers. According to consistent case-law of the Court, Article 45 TFEU opposes any measure which is capable of hindering or rendering less attractive the exercise by EU nationals of their freedom of movement of workers. If indeed the measure presents an obstacle to free movement, it could be compatible with Article 45 TFEU only if it pursues a legitimate objective in the public interest, if it is appropriate to attain that objective and if it does not go beyond what is necessary to attain that objective. Likewise, the rules of collective agreements governing supplementary pension schemes should not only comply with specific EU legislation adopted in this field, but also with the requirements of Article 45 TFEU on free movement of workers. It is for the national administration and judiciary to interpret and apply domestic law in conformity with Union law. Their task is not an easy one.

BIBLIOGRAPHY

Baïni, C, J Ernst, J Henrard and G Jacquemart (2012), *La flexibilité en droit du travail*, Limal: Anthemis.

Barnard, C (2009), 'The UK and Posted Workers: The Effect of Commission versus Luxembourg on the territorial application of British labour law', *Industrial Law Journal* **38**, 122–132.

Bergman, J and P Schoukens (eds) (2011), *The Social Security of Moving Researchers*, League of European Research Universities, Leuven.

Christensen, A and M Malmstedt (2000), 'Lex Loci Laboris versus Lex Loci Domicilii – An Inquiry into Normative Foundations of European Social Security Law', *European Journal of Social Security*, 69.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

Cornelissen, R (1986), 'Communautaire en Nederlandse jurisprudentie inzake conflictregels in het Europees sociale zekerheidsrecht', *SEW* 799–823.
Cornelissen, R (1996), 'Die Entsendung von Arbeitnehmern innerhalb der Europäische Gemeinschaft und die soziale Sicherheit', *Recht der Arbeit*, 329 et seq.
Cornil, L and G Van Limberghen (1997), 'Dissonanten in grensoverschrijdend arbeids-en socialezekerheidsrecht', in M Rigaux and W Van Eeckhoutte (eds), *Actuele problemen van het arbeidsrecht*, Ghent: Academia Press.
Defossez, A (2014), 'Le dépassement de la question du dumping social: Une condition nécessaire à une meilleure application de la directive détachement', (Belgian) *Tijdschrift voor Sociaal Recht*, 89–131.
Deneve, C (2001), *Grensoverschrijdende conflicten in het arbeidsrecht*, Antwerp: Intersentia.
Devos, K (2010), *Detachering binnen de Europese Unie: la revancha del tango de Europa. Grensoverschrijdende arbeid en vrij verkeer van diensten*, Kortrijk: UGA.
Dorssemont, F, T Jaspers and A van Hoek (eds) (2007), *Cross-border Collective Actions in Europe: A Legal Challenge*, Antwerp: Intersentia.
Eichenhofer, E (2010), *Das Sozialrecht der Europäischen Union*, 4th edn, Berlin: Schmidt Verlag.
Filhon, G (2012), 'Ingénierie sociale et détachement européen', *Revue des affaires européennes* 115–131.
Fuchs, M (ed) (2013), *Nomos Kommentar zum Europäischen Sozialrecht*, 6th edn, Nomos: Baden-Baden.
Gundt, N (2011), 'Working person = worker = employee?', *Journal of European and Comparative Law* 366–381.
Houwerzijl, M (2005), *De detacheringsrichtlijn. Over de achtergrond, inhoud en implementatie van Richtlijn 96/71/EG*, Deventer: Kluwer.
Houwerzijl, M (2011), 'Het arrest Vicoplus. Bij grensoverschrijdende uitzendarbeid is zowel het vrij verkeer van werknemers als het vrij verkeer van diensten van toepassing', *Nederlands Tijdschrift voor Europees Recht* 259–265.
Jorens, Y (ed) (2009), *50 Years of Social Security Coordination*, Brussels: European Commission.
Jorens, Y (ed) (2009), *Handboek Europese detachering en vrij verkeer van diensten*, Bruges: die Keure.
Meeusen, J, M Pertegas and G Straetmans (eds) (2004), *Enforcement of International Contracts in the European Union. Convergence and Divergence between Brussels I and Rome I*, Antwerp: Intersentia.
Merrett, L (2011), *Employment Contracts in Private International Law*, Oxford: Oxford University Press.
Morsa, M (2012), *Securité sociale, libre circulation et citoyenneté européenne*, Limal: Anthemis.
Neal, A (2013), 'Freedom of Movement for Employers and Employees in the European Union. Some Observations from the Perspective of a High-Wage Economy', *European Labour Law Journal* 33–71.
Pennings, F (2015), *European Social Security Law*, Antwerp-Oxford-Portland: Intersentia, 6th edition.
Schmitt, M (2011), *Droit du travail de l'Union européenne*, Brussels: Bruylant.
Schoukens, P and D Pieters (2009), 'The Rules within Regulation 883/2004 for Determining the Applicable Member State Legislation', *European Journal of Social Security* 81–118
Spaventa, E (2009), 'The Impact of Articles 12, 18, 39 and 43 EC of the EC Treaty on the Coordination of Social Security Systems', in Y Jorens (ed), *50 Years of Social Security Coordination*, *Report of the Conference Celebrating the 50th Anniversary of the European Coordination of Social Security*, Brussels: European Commission, 112–128.
Spiegel, B (2006), 'Die neue europäische Sozialrechtskordinierung-Überlegungen zur Verordung (EG) Nr. 883/2004', *Zeitschrift für ausländisches und internationales Arbeits- und Sozialrecht* 85 ff.
Steinmeyer, M (1981), *Die Einstrahlung im internationalen Sozialversicherungsrecht*, Berlin: Duncker und Humblot.
Świątkowski, A (2011), *European Union Private International Labour Law*, New York: Columbia University Press.
Van Hoek, A and M Houwerzijl (2011), '"Posting" and "Posted Workers": The Need for Clear Definitions of Two Key Concepts of the Posting of Workers Directive', in *Cambridge Yearbook of European Legal Studies*, 419–451.
Van Overbeeke, F (2013), 'Het IPR [Internationaal privaatrecht] als instrument ter versterking van de positie van de gedetacheerde werknemer in het web van het vrije verkeer', (Belgian) *Tijdschrift voor Sociaal Recht* 699–751.
Van Overbeeke, F (2013), 'Over de interactie tussen het IPR en de bepalingen van het vrij verkeer, toegespitst op internationale arbeidsovereenkomsten', *Rechtskundig Weekblad* 643–652.
Van Overbeeke, F (2013), 'Noot Schlecker C-64/12. Europees recht in kort bestek', *Rechtskundig Weekblad* 1035–1037.
Van Overmeiren, F (2008), *Buitenlandse arbeidskrachten op de Belgische arbeidsmarkt. Sociaal recht en vrij verkeer*, Ghent: Larcier.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

Van Peijpe, T (2012), 'EU Limits for the Personal Scope of Employment Law', *European Labour Law Journal* 35–53.
Van Regenmortel, A, H Verschueren and V Vervliet (eds) (2007), *Sociale zekerheid in het Europa van de markt en de burgers: enkele actuele thema's*, Bruges: die Keure.
Verschueren, H (2008), 'Cross-border Workers in the European Internal Market: Trojan Horses for Member States' Labour and Social Security Law', *International Journal of Comparative Labour Law and Industrial Relations*, **2**, 167–199.
Verschueren, H (ed) (2011), *Werken over de grens België-Nederlands. Sociaal en fiscaalrechtelijke grensconflicten*, Antwerp: Intersentia.
Verschueren, H and M Houwerzijl (eds) (2009), *Toepasselijk arbeidsrecht over de grenzen heen: België, Nederland, Europa, de wereld*, Deventer: Kluwer.
Vonk, G (2001), 'Conflicterend conflictenrecht', *Sociaal Maandblad Arbeid* 150–163.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:53:43PM
via University College London (UCL)

15. A European pensions union: Towards a strengthening of the European pension systems

*Pascal Borsjé and Hans van Meerten**

I. INTRODUCTION

Due to the ageing of the European population, over the years much thought has been given at European level to the sustainability (in particular affordability) of the pension system on the one hand, and to the flexibility of the labour market on the other, with pensions forming part of terms of employment.[1] In this regard the sustainability and financial structure of pension systems cannot be viewed independently from the stability of the European financial system and the economy as such. The most recent financial and economic crisis resulted in, among other things, a significant strengthening of European financial supervision within the European Union and now, in the eurozone, initial steps towards developing a banking union and the introduction of a separate Treaty on Stability, Coordination and Governance in the EMU (the Fiscal Compact), which sets out rules for national budgets of the signatory EU Member States. Legislation on, for example, European insurance funds (the Solvency II Directive[2]) and investment funds (the amendments to the UCITS Directive[3]) have seen further harmonisation at European level.

In addition, in the European labour market, pension schemes in cross-border situations are often beset with practical problems regarding the relationship between various tax and social laws and regulations.

Despite the explicit European dimension of the pension issue and attempts of the European Commission to, on the one hand, encourage the Member States to future-proof their retirement provisions and, on the other hand, to increase coordination

* The chapter was initially presented as a working paper for the EIOPA conference Bratislava on 15 April 2014. Since then, several changes have been made and parts of an earlier version of this contribution appeared in Dutch, in (2014) 8 *Tijdschrift voor Europees recht*.

[1] See, for example, the Communication of the European Commission, *Dealing with the Impact of an Ageing Population in the EU* (European Commission 2008), European Commission, *Meeting Social Needs in an Ageing Society* (European Commission 2008); European Commission, *Towards Adequate, Sustainable and Safe European Pension Systems* (European Commission 2010); European Commission, *An Agenda for Adequate, Safe and Sustainable Pensions* (European Commission 2012).

[2] Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L 335/1.

[3] Directive 85/611/EEC on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS) [1985] OJ L 375, 3–18.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

between the national pension systems, in practical terms the European pension sector is still organised mainly along national lines.

The pension institutions in various Member States are, for instance, still principally active within their own national borders. The forms of retirement provisions also vary from one Member State to the next, with some countries, such as the Netherlands and the United Kingdom, which have large well-funded systems for occupational pension schemes, doing relatively well. The lack of a more 'mature' European pension standard is regrettable because an occupational pension scheme, for example, is not available to a considerable number of European employees.

It is therefore not surprising that the European Commission (EC) keeps trying to take further measures to strengthen the European pension system. At the beginning of 2014, for instance, the EC announced that, in relation to labour mobility within the European Union, it would scrutinise the tax obstacles to (among other things) pensions accrued for cross-border activities of individuals, and remind the EU Member States of their obligations under European law.[4] Furthermore, also in 2014, the EC presented a proposal to revise the so-called IORP Directive ('IORP II Proposal'),[5] and, at the request of the EC, the EIOPA[6] prepared a report on the development of a common European 'Personal Pension Plan'.[7] In the meantime, the Council of the European Union has agreed on the IORP II Proposal, after amendments made to the original proposal of the EC (*revised* IORP II Proposal).[8] At the time of writing, the IORP II Proposal was still under review by the European Parliament.

As far as is clear at this point, the proposals seem to strive for further harmonisation of the internal market for pension services within the EU. It is debatable to what extent these proposals will also have consequences, either directly or indirectly, on those areas which, in principle on the basis of the current status of EU law, are at the discretion of the national policymakers of the Member States, i.e., especially (aspects of) social and tax legislation of the Member States.

This contribution will especially address the EC's general policy in respect of the IORP II Proposal, also in connection with general more recent EU law developments, and its consequences for the pension systems of the EU Member States, with a focus on the occupational pension system of the Netherlands. It can be concluded that these

---

[4] *Free movement of people: Commission to tackle tax discrimination against mobile EU citizens*, press release from the EC – IP/14/31, 20 January 2014**.**

[5] Directive No 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision (IORPs) [2003] OJ L 235, 10–21; the proposal for a revision of the IORP Directive (IORP II Proposal) has been published by the European Commission, *A Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision* (European Commission 2014).

[6] European Insurance and Occupational Pensions Authority, (EIOPA).

[7] EIOPA, *Towards an EU Single Market for Personal Pensions. An EIOPA Preliminary Report to COM* (Brussels EIOPA).

[8] The proposal as agreed upon by Council of the European Union (*revised* IORP II Proposal) has been published as *A Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (recast)* (European Commission 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

EU law developments are laying the foundations of a 'European Pensions Union'. Such a European Pensions Union would be understood as a general European framework for sustainable – and a more than basic – pension provision for the citizens of the European Member States, which would include EU supervisory rules and accommodate EU cross-border pension provisions. From a practical perspective, and also in line with the approach of the EC and the legislative developments at EU level, such a European Pensions Union could typically be established on an EU standard for a capital-funded pension system, in accordance with an occupational (Second Pillar) pension system – or private, individual (Third Pillar) pension system. The development of such a European Pensions Union would, however, of course also have consequences for the role of statutory (First Pillar) public pension schemes of the Member States and therefore First Pillar pension arrangements should as such be part of the general social structure of a European Pensions Union in line with the *social*-economic goals of the EU Treaties.

This EU harmonisation in the pension sector ultimately serves to protect members of pension schemes and, for example, to prevent pension funds from allowing a lack of clarity to exist about their ability to meet their obligations to their members. Members of pension schemes would obviously, therefore, benefit from clarity about existing pension entitlements. This also presents opportunities for Member States with more developed pension systems, such as the Netherlands and the United Kingdom. For example, major Dutch asset management organisations and pension providers as well as insurance companies could very well offer their services and know-how abroad. With greater efficiency and economies of scale, the strengthening and further development of fund entities and the provision of pension services could also benefit the national pension market and those participating in it. Furthermore, an increasing number of European employees work in cross-border situations and certainly stand to gain from a better integration of pension accrual in the European labour market. These include not only employees of internationally operating companies but also, for example, inhabitants of cross-border regions who work and live in different EU Member States. A lack of European integration is keeping the markets closed off and, as a result, opportunities for growth and improvement in the European pension and labour markets are not being sufficiently harnessed.

II. THE IORP DIRECTIVE

II.i General

The IORP Directive, which has been in force since 2003, regulates funded pension institutions that provide occupational pension schemes (i.e., Institutions for Occupational Retirement Provision, or IORP). A pension institution that qualifies as an IORP under the Directive may, based on the supervision carried out in the Member State in which it is established, provide cross-border pension services (i.e. it has a IORP Passport). The IORP Directive sets a number of general solvency and financing requirements, certain investment rules (based on the prudent person principle) and general administrative and governance requirements (in particular regarding the

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

provision of information). These are just general rules which provide for minimum harmonisation of pension entities, allowing the Member States a considerable degree of freedom to elaborate the rules on the IORP in question at national level.

In the Netherlands, the IORP Directive has largely been implemented in the Pensions Act (*Pensioenwet*) and the Financial Supervision Act (*Wet op het Financieel Toezicht*). In that regard the Dutch pension funds and premium pension institutions (PPIs) qualify as regulated IORPs within the meaning of the Directive. Other European Member States have similar IORP entities. However, due to the differences between the national pension systems in combination with social, labour and tax legislation that differs from one country to another, there can be marked differences between these pension institutions in terms of both their socio-economic roles and their legal structures. Furthermore, in implementing the IORP Directive some Member States have consciously aimed to strengthen their own financial services sectors by facilitating the establishment of specific pension entities within their own territorial jurisdictions, which could also provide an efficient cross-border pension solution for members and (international) undertakings established in other EU Member States.[9] Taking a different approach, various Member States have also tried to shield their pension systems from European influence and, in doing so, have used the fact that the relevant social, labour and tax laws seem to be, in principle, the (almost) exclusive domain of the Member States themselves.[10] Typically, this also resulted in the Council – represented through the ministers of the Members States – making amendments to the proposed delegated authority of the EC under the original IORP II Proposal, to be further discussed below.

In developing the proposals for the IORP Directive, the EC noted that, in a number of Member States (including the Netherlands), IORPs already play an important role in the relevant pension and social security systems. There are approximately 125,000 IORPs operating throughout the EU. The assets managed by them can be estimated at around EUR 3 billion, even though these IORPs administer the retirement provision of just 75 million Europeans, i.e. about 20 per cent of the entire EU employee population.[11]

Table 15.1 shows the number of IORPs and the assets managed by them as at the end of 2011.

Given the extent of the entire pension assets that are invested, IORPs, together with other financial institutions such as, for example, banks and insurers, play an important role in financing the European economy as well as in the functioning of the European Union's capital markets. The reason was partly to regulate the activities of the IORPs in a Directive at European level, whilst at the same time strengthening the European cross-border financial market for pension institutions.[12] The IORP Directive was also

[9] Examples of this include SEPCAV (*Société d'épargne-pension à capital variable*) and ASSEP (*Association d'épargne-pension*) based in Luxembourg, OFP (*Organisme voor de financiering van pensioenen*) based in Belgium, and the Dutch PPIs.

[10] See *infra* footnote 50.

[11] See also European Commission, *Impact assessment on Proposal for a Directive amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision* (European Commission 2014).

[12] The eventual proposal for the IORP Directive therefore formed part of the *Financial Services Action Plan* of 1999 which, inter alia in connection with the introduction of the

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

Table 15.1 Number of IORPs and assets managed by them as at end 2011

	Number	Assets (€ millions)		Number	Assets (€ millions)		Number	Assets (€ millions)
BE	226	15,910	IT	352	69,050	PT	197	12,650
BG	1	na	CY	1,651	na	RO	11	110
DK	26	7,060	LV	7	170	SI	9	1,835
DE	181	138,570	LU	19	970	SK	5	1,180
IE	68,500	70,000	HU	1	na	FI	56	4,120
EL	9	60	NL	514	774,060	SE	86	30,900
ES	363	31,690	AT	17	14,760	UK	50,880	1,319,930
FR	1	na	PL	5	360	Total	125,129	2,492,485

Source: European Commission, Impact assessment on Proposal for a Directive amending Directive 2003/41/EC on the activities and supervision of institutions for occupational retirement provision (European Commission 2014)

intended to facilitate the cross-border provision of pensions, partly to facilitate labour mobility in the EU.

In addition, the IORP Directive was also intended to further stimulate the transition to funded retirement provision within the EU to safeguard its future sustainability in the EU Member States. Such provision is ideally suited to being organised along with occupational pension arrangements. In the Netherlands and most other EU Member States, occupational pension arrangements are seen as a provision in addition (Second Pillar) to the basic retirement provision provided by the government (First Pillar, such as the General Old Age Pension (AOW) that applies in the Netherlands).[13] From a general technical pension perspective, a funded retirement provision (administered by a pension fund, for example) seems preferable because, given the ageing population, the sustainability of systems financed on a pay-as-you-go basis will come under increasing

European currency, attempted to provide a further stimulus to the provision of financial services in the internal market. For background to this, see for example http://ec.europa.eu/internal_market/finances/actionplan/index_en.htm#maincontentSec1 and JC van Haersolte, 'Een mammoettanker is de mistige haven van Lissabon binnengevaren: de afsluiting van het Actieplan Financiële Diensten' [2006] *Nederlands Tijdschrift voor Europees Recht* 102–109 and 141–152.

[13] Apart from the First Pillar and the Second Pillar, there are also of course *individual* (additional) retirement provisions (Third Pillar), such as, e.g., individual annuity provisions provided by insurance companies in the Netherlands and other EU Member States. Also given the wide variety of individual pension products, the analysis of this contribution focuses, as stated above, on the EU developments for the Second Pillar retirement provisions under the IORP Directive. In section VII below the EIOPA proposal of a Personal Pension Plan will be discussed, which can be understood as an effort to also accommodate Third Pillar cross-border pension solutions.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

pressure in the long term.[14] The Dutch General Old Age Pension, the First Pillar provision, is generally government financed (or funded by public authorities) on a pay-as-you-go basis.

II.ii IORPs and Insurers

Apart from IORPs there are, of course, other entities as well that administer funded retirement provision in the European market. Among these are (commercial) pension insurers which, in addition to the pension funds (and e.g. Dutch PPIs), administer employment-related (Second Pillar) retirement provisions in the Netherlands and other countries. Insurers have their own European supervisory regime which, in recent years, has been thoroughly revised and laid down in the Solvency II Directive.[15] This Solvency II Directive regulates European insurance undertakings with a view to protecting insured persons (in particular individual consumers) and promoting the stability of the financial market. Inspired by the supervisory framework developed for the banking sector in the Basle Accords, the Solvency II Directive has been divided into three so-called pillars. Put briefly, this pillar structure contains Pillar 1, with (quantitative) capital requirements to strengthen the solvency of insurance undertakings; Pillar 2, with qualitative requirements for the (internal) control processes/governance and insurers' risk management; and Pillar 3, with transparency and communication requirements for consumers and for supervisory reporting purposes.

The EC intends to bring about a level playing field for IORPs and insurers so that all market parties can, as far as possible, participate on equal terms in a balanced European pension market. From an economic perspective, both IORPs and insurers can be regarded as providers of a financial service (i.e. a pension insurance product), entailing the obligation to safeguard the pension insurance arrangements of the individual pension members or insured persons.[16] In the proposal for the revision of the IORP Directive, to be discussed below, the EC has therefore, with the backing of advice from the EIOPA, adhered to the aforementioned basic premises of the regulatory frameworks under the Solvency II Directive.

However, this approach has mainly been accompanied by criticism from the European pensions sector, which points out that, in many cases, IORPs operate as

---

[14] For further background to the IORP Directive see, e.g., H van Meerten and B Starink, 'Cross border problems and solutions for IORPs' (2011) 1 *EC Tax Review*; A van den Brink, H van Meerten and S de Vries, *Regulating Pensions; Why the EU Matters* (Netspar 2011) and H van Meerten, 'The Scope of the IORP Directive', in U Neergaard, E Szyszczak, JW van de Gronden and M Krajewski (eds), *Social Services of General Interest in the EU* (TMC Asser Press 2013).

[15] Directive 2009/138/EC on the taking-up and pursuit of the business of Insurance and Reinsurance (Solvency II) [2009] OJ L 335/1. This Directive replaces the current insurance Directives ('Solvency I') and is scheduled to enter into force 1 January 2016.

[16] See also recital 20 to the current IORP Directive, which is maintained as such in the IORP II Proposal. EIOPA has advised the EC to apply the governance framework of Solvency II to IORPs as well; see EIOPA-CP-11/001, 8 July 2011.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

social institutions[17] without a commercial objective and are managed by the representatives of employers and employees (or employee organisations); furthermore, the governance of IORPs is often embedded in national social and labour-law frameworks. The assumption in this regard is that the interests of pension scheme members would be 'better' served in that way than if IORPs operate on a purely commercial basis.[18]

II.iii IORPs in the Context of Competition Law and Compulsory Membership in the Netherlands

From an economic perspective, as providers in the European pension market, IORPs are in direct competition with the (generally) commercial pension insurers.[19] If they are not under direct government supervision but rather operate on the basis of a certain degree of independence, then, according to the Court of Justice of the European Union, IORPs can in fact, like commercial insurers, be regarded as 'undertakings' from the perspective of European competition law.[20] On the other hand, the Court has acknowledged that certain IORPs such as, for example, the Dutch industry-wide pension funds, fulfil an *essential social function* by performing services of general economic interest.[21]

EU case law thus accepts one of the fundamental characteristics of the current Dutch pension system, specifically compulsory membership of industry-wide pension funds for employees who work in the relevant industries (this is actually referred to as 'compulsory membership').[22] The purpose of this compulsory membership is to prevent competition between retirement provisions within a particular industry and to provide

---

[17] See, for example, the *Statement on IORP II* by PensionsEurope (umbrella organisation of European pension funds), which makes the following comment on the IORP II Proposal: 'IORPs are first and foremost social institutions', see: www.pensionseurope.eu/system/files/PensionsEurope%20statement%20on%20IORP%20II_0.pdf. The Netherlands Pension Federation (*Nederlandse Pensioenfederatie*) (umbrella organisation of Dutch pension funds) uses exactly the same words in its *Position Paper* on the IORP II Proposal; see www.pensioenfederatie.nl/Document/Standpunten/PositionPaper_%20IORP_II-Directive.pdf.

[18] Typically, in this respect, the Council has introduced amended wording to the recital of the IORP II Proposal, indicating that IORPs 'are pension institutions with a social purpose', which seems to exclude IORPs that would choose to (also) operate on a commercial basis, see recital 20 of the *revised* IORP II Proposal.

[19] It should be noted that the distinction made here between IORPs and insurers, for the sake of clarity, cannot always be strictly made: in the Netherlands, for example, a PPI qualifies as an IORP; however, a Dutch IORP of this type can also be established by commercial parties and provide pension services on that basis.

[20] Case C-67/96 *Albany International* [1999] ECR I-05751; Case C-115/97-117/97 *Brentjens' Handelsonderneming* [1999] ECR I-06025; Case C-219/97 *Albany*, *Brentjens and Drijvende Bokken*, further *Drijvende Bokken* [1999] ECR I-06121.

[21] See respectively *Albany*, at [104]–[105], *Brentjens*, at [104]–[105], *Drijvende Bokken*, at [94]–[95].

[22] See section 2 Dutch Industry-Wide Pension Funds (Compulsory Membership) Act 2000 (*Wet verplichte deelneming in bedrijfstakpensioenfonds* 2000). Some other EU Member States also have a (quasi) compulsory occupational (Second Pillar) pension system (e.g. Sweden), however, the Dutch Second Pillar pension system more typically also mainly consists of defined benefit (DB) schemes – as will also be discussed further below.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

all employees in that industry with an additional pension scheme.[23] Compulsory membership creates a pension services monopoly for industry-wide pension funds in the Dutch industries in question, but this can be allowed due to the fact that they fulfil an essential social function.[24] The Court also regards compulsory membership as necessary to finance the industry-wide pension funds, and points out that in the Dutch context a Dutch industry-wide pension fund operates on the basis of the principle of solidarity. Although the exact outlines of this term 'solidarity' are not very sharply defined in the case law of the Court of Justice, solidarity in the Netherlands is based on, among other things, statutory pension provisions that do not apply any risk selection to participation and determination of the contribution, nor is there any direct economic link between the contribution paid by the member (and the employer) and the performance delivered by an industry-wide pension fund. For example, they include contribution-free accrual for the disabled and cover for overdue contributions in the event that the employer goes bankrupt.[25] This means that an industry-wide pension fund effectively combines the positive and negative probabilities between employees and companies, with compulsory membership forcing parties who are only subject to low risks (and who may possibly be able to stipulate a lower contribution with a commercial insurer) to contribute to an industry-wide retirement provision whereby the costs remain at an 'acceptable' level within the entire sector. The Court has also held that these elements of solidarity reduce the competition from the industry-wide pension funds with commercial pension insurers. From the European competition law perspective, the principle of solidarity is the foundation on which the special social-law and labour-law position of an IORP can be based. In what follows, however, it can be observed that, in revising the IORP Directive, the European Commission has raised questions about the way in which solidarity is dealt with. The implementation of the IORP II Proposal could therefore also have consequences for Dutch compulsory membership.

---

[23] M Heemskerk, 'Op zoek naar de grenzen van de solidariteit in het aanvullend pensioen' [2013] *WPNR* 6968. In this regard, the industry-wide pension funds must limit their responsibilities and do no more than administer retirement provisions (product limitation), strictly within the sector in question (domain limitation), so that competition with the rest of the (commercial) insurance market is not distorted.

[24] See Articles 102 and 106 TFEU. Although, in addition, the structure agreed by the social partners on the basis of negotiations on a collective bargaining agreement with employees participating compulsorily in an industry-wide pension fund also constitutes a competition-law infringement of the cartel prohibition of Article 101(1) TFEU, the Court of Justice held that collective bargaining negotiations are in accordance with the aims of the TFEU (see Articles 151 and 152) and thus do not come under the scope of Article 101 TFEU. Those who have voiced criticism of this argument include, for example, S Prechal and SA de Vries in 'Viking/Laval en de grondslagen van het internemarktrecht' (2008) 11 *Tijdschrift voor Europees en Economisch Recht*.

[25] The Dutch industry-wide pension funds are supposed to set a so-called average contribution, on the basis of section 8 Dutch Industry-Wide Pension Funds (Compulsory Membership) Act 2000: 'The contribution owed by or for the members is equal for all members or, for all members, amounts to an equal percentage of the salary or of the part of the salary that qualifies for calculating the pension, on the understanding that different contributions may be determined for different forms of pensions and different pension schemes.'

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

In the literature it is generally presumed that, (partly) on the basis of the aforementioned case law, Dutch compulsory membership is also tenable under European competition law.[26] In the judgments in question, however, the Court held that, on the basis of the aforementioned social function, the authorised compulsory membership in pension schemes was deemed to contribute towards guaranteeing a minimum norm (based on national criteria) for an acceptable pension level.[27] When those judgments were issued, that norm in the Netherlands was still 70 per cent of an individual's final salary; in the meantime, due to the new economic reality, this norm has been adjusted downwards (with the aim of attaining 70 per cent of the average salary earned by an individual). However, it is debatable whether even that could still, in all cases, be termed a realistic ambition, and the increasing trend in the Netherlands (as well as the rest of Europe) is towards abandoning the idea of guaranteed retirement benefits, with the solidarity and 'social' character of the pension scheme also coming under pressure.[28] This development will therefore immediately raise the question of whether 'compulsory membership', in particular as regards the further reform of the Dutch pension system, will still be tenable from the perspective of European competition law.[29]

---

[26] See, for example, M Heemskerk, 'Op zoek naar de grenzen van de solidariteit in het aanvullend pensioen' [2013] *WPNR* 6968; MJCM van der Poel, *De houdbaarheid van verplicht gestelde bedrijfstakpensioenfondsen en beroepspensioenregelingen* (Vrije Universiteit 2013).

[27] See respectively the cases mentioned in note 21, *Albany* at [122]; *Brentjens* at [122]; *Drijvende Bokken* at [112]. In this context, see also Case C-41/90 *Höfner and Elser* [1991] ECR I-01979 in which the Court held that exclusive employment procurement was impermissible under competition law because the arrangement could not satisfy the demand for the procurement in question.

[28] See H van Meerten and P Borsjé, 'Het "nieuwe" pensioencontract: de reële ambitieovereenkomst en andere alternatieven' [2013] *PensioenMagazine*, 2013; and JHH Tuijp, 'Beschikbare premieregeling beter dan toegezegde uitkeringsregeling' (2014) 4 *Pensioen & Praktijk*. It may be noted here that, in a report to EIOPA regarding the preparation of a recommendation for the revision of the IORP Directive, the Dutch Ministry of Social Affairs and Employment adopted the position that all Dutch schemes have an uncertain DC (Defined Contributions) character because of the possibility of entitlements being cut; see also DL Kok, JA Gielink, 'Het nieuwe pensioencontract en de Pensioenfondsenrichtlijn; buffers verplicht?' (2012) 14 *Tijdschrift voor Pensioenvraagstukken*.

[29] See Case C-180/98 *Pavlov* [2000] ECR I-06451 [128] and [129], in which a compulsory Dutch occupational pension scheme was considered permissible under competition law, but the question of whether the scheme in question met the needs of its members could have led to a different result; the same conclusion is drawn by MJCM van der Poel, *De houdbaarheid van verplicht gestelde bedrijfstakpensioenfondsen en beroepspensioenregelingen* (Vrije Universiteit 2013) 47.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

III. REVISION OF THE IORP DIRECTIVE: THE IORP II PROPOSAL

In its Explanatory Memorandum, the European Commission set out four specific objectives in revising the IORP Directive:[30] (i) removing remaining prudential barriers for cross-border IORPs; (ii) setting requirements for good governance and risk management; (iii) providing clear and relevant information to members and beneficiaries; and (iv) ensuring that supervisors have the necessary tools to effectively supervise IORPs.

In this regard, numbers (ii) and (iii) directly reflect aspects from Pillar 2 and Pillar 3, respectively, from the aforementioned Solvency II Directive.

III.i Legal Basis

The legal basis of the IORP II Proposal is to be found principally in the free movement of persons and services provisions and the ordinary legislative procedure (Article 114 TFEU) for the establishment of a common internal market: in principle, the measures in question in the EU are adopted by a qualified majority of the Member States.[31] Thus, the Directive is and remains[32] an internal market for services Directive, and competence is not shifted to, for example, Article 153 TFEU on social protection (in terms of, for example, working conditions), which provision may also possibly be taken into consideration in establishing pension entitlements. The fact that the draft IORP II Directive will not be adopted on the basis of Article 153 TFEU is important to the European legislative process, as the measures listed under Article 153 TFEU must be adopted by the Member States unanimously, which would mean that an individual Member State could, in principle, block the adoption of this Directive single-handedly.[33]

If Article 114 TFEU remains the legal basis for the IORP II Directive, the regulation of the occupational retirement provision will thus also remain, principally, an internal market concern.[34]

With regard to the process of implementing the IORP II Proposal, it seems that under the draft IORP II Proposal, the EC aimed to establish the IORP II Directive with the characteristics of – what was until recently called – a Lamfalussy Directive, with the harmonised rules being adopted in four stages.[35]

---

[30] See para 1.1 of the Explanatory Memorandum to the IORP II Proposal.

[31] In this regard, the proposal refers to Articles 53, 62 and 114 TFEU.

[32] The legal basis of the current IORP Directive is the same.

[33] See Article 153(2) TFEU.

[34] It remains to be seen whether the European Parliament also consents to using Article 114 TFEU as the basis. In the Netherlands, for example, the IORP II Proposal has been criticised; see *Parliamentary Papers II* 2013–2014 22 112 no 1837.

[35] At the first level, the Council of Ministers (made up of the national ministers) formulate the principles or frameworks, and they usually adopt them in a Directive (i.e., in the context of the current IORP II Proposal as well). At the second level, the Commission elaborates these principles (in technical terms as well) in Directives or Regulations, with the assistance of the level 2 committees (which are made up of representatives of the Member States' ministerial

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

In a certain sense, the Lamfalussy structure has been codified by the establishment of the three European Supervisory Authorities[36] (the European Banking Authority, European Securities and Markets Authority, and EIOPA) in combination with a modified treaty framework under the TFEU.[37] The TFEU distinguishes between legislative and non-legislative acts.[38] The IORP II Proposal made reference to Article 290 TFEU, delegating to the EC the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of a legislative act.[39] In many cases, this means that EIOPA writes the draft versions of the delegated and the implementing acts on the basis of Articles 290 and 291 TFEU.[40] After that, the European Commission (formally) ratifies these acts (also referred to as level 2.5).

The preliminary stance of the Netherlands on the IORP II Proposal already contained a reservation in relation to this delegated legislation in the IORP II Directive, and moreover, under the *revised* IORP II Proposal, as agreed by the Council, the provisions on delegating powers for the EC have been completely deleted.[41]

III.ii Cross-border Activity

The current IORP Directive has not had the desired results. The number of cross-border IORPs has remained modest, and the envisaged operation of market forces between European IORPs within a European pension market has not materialised. Article 16(3) of the current IORP Directive provides:

---

departments; this procedure is also referred to as 'comitology'). At the third level, the national supervisory authorities work together to advise on the rules and the implementation of supervision. These level 3 committees are made up of representatives of the supervisory authorities of all 28 EU Member States and, in this case, are therefore members of EIOPA. At the fourth level, the European legislation is implemented by the Member States, under the supervision of the European Commission, which, if necessary, can take corrective action on the basis of Article 258 TFEU. See also H van Meerten and J van Haersolte, 'Zelfrijzend Europees bakmeel: de voorstellen voor een nieuw financieel toezicht' (2010) 2 *Nederlands Tijdschrift voor Europees Recht*.

[36] M Rötting and C Lang, 'Das Lamfalussy-Verfahren im Umfeld der Neuordnung der europäischen Finanzaufsichtsstrukturen' (2012) 23 *Europäische Zeitschrift für Wirtschaftsrecht* 8–14.

[37] Agreed under the Treaty of Lisbon.

[38] The relationship to the Lamfalussy structure has been summarised by H van Meerten and A Ottow, 'The Proposals for the European Supervisory Authorities: The Right (Legal) Way Forward?' (2010) 1 *Tijdschrift voor Financieel Recht*.

[39] M Charmon, 'Comitologie onder het Treaty of Lisbon' (2013) 2 *Tijdschrift voor Europees en Economisch Recht*.

[40] This power is generally defined in the directive itself.

[41] It should be noted that the Dutch government's criticism is chiefly concerned with the increased information requirements for pension funds, which the government claims could lead to a greater administrative burden – which seems to have been substantially limited under the *revised* IORP II Proposal – and the powers delegated to the EC in this regard in Article 54 of the IORP II Proposal, as deleted in the *revised* IORP II Proposal; see footnote 35 above.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

> In the event of cross-border activity as referred to in Article 20, the technical provisions shall at all times be fully funded in respect of the total range of pension schemes operated. If these conditions are not met, the competent authorities of the home Member State shall intervene …

Many in the European pension market see this full funding requirement as one of the greatest obstacles[42] to IORPs developing cross-border activities between Member States. The fact is that if a pension scheme is not fully funded, sponsoring undertakings simply cannot, for example, transfer their pension scheme to an administrator in other Member States. Given the problematic state of, for example, many Dutch and English pension funds, this requirement can – at least potentially – have a restrictive effect. Although an earlier, leaked draft text of the IORP II Proposal had eliminated the full funding requirement, it has nevertheless been maintained in the EC's proposal as also agreed by the Council.

On the other hand, the definition of 'cross-border' has been clarified in the sense that to qualify as a cross-border activity, it seems that the social and labour law that is applicable to a pension scheme must be different from the law of the territorial jurisdiction in which the IORP is established. This means, for example, that under the text of the IORP II Proposal, the situation in which the sponsoring undertaking and the IORP are in the same Member State does qualify as a cross-border activity if the members of the pension scheme in question are in a different Member State.[43] Of importance in this regard is that, in principle, the 'home Member State' (i.e., the territorial jurisdiction in which the IORP is established) plays a leading role whereby complex exchanges of information and approval procedures between the home Member State and the 'host Member State' should be avoided.[44] In that case, the host Member State would not be allowed to impose any extra restrictions on investment policy, or prudential requirements on the IORP: such supervision would be carried out by the authorities of the home Member State. The host Member State would not be able to impose any additional investment requirements on the home Member State either.[45]

The IORP servicing cross-border pension arrangements would have to comply with the social and labour laws of the host Member State, but they would not be allowed to contain any additional prudential rules.[46] If local social or labour laws are infringed, the national supervisory authority would have to notify the authorities of the home Member State, who would then take enforcement measures, with the local supervisory authority

---

[42] 'Obstacle' means here any measure that could hinder the proper functioning of the internal market, see Case C-8/74 *Dassonville* [1974] ECR 00837 [5].

[43] See paragraph 3.4 of the Explanatory Memorandum to the IORP II Proposal, *Detailed explanation of the proposal*, to Article 12 in Title I (General Provisions).

[44] Under the applicable regime, this cooperation is further elaborated in the Budapest Protocol, Protocol Relating to the Collaboration of the Relevant Competent Authorities of the Member States of the European Union in particular in the Application of the Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the Activities and Supervision of Institutions for Occupational Retirement Provision (IORPs) Operating Cross-Border Activity, CEIOPS-DOC-08-06 Rev1, 30 October 2009.

[45] See Article 20(7) of the IORP II Proposal.

[46] See Article 61 of the IORP II Proposal.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

ultimately being able to intervene in the event of a persistent infringement of local social legislation.[47]

In addition, specific provisions have been added that regulate the transfer of pension schemes from one IORP to another IORP.[48] The aforementioned new draft articles of the draft IORP II Directive thus contain improved provisions on how a cross-border activity should be established. Under the *revised* IORP II Proposal as agreed by the Council, however, the transferring IORP would be subject to specific (information) procedures to its local supervisory authorities, also in accordance with local social and labour law provisions. More specifically, such local authorities may refuse authorisation of the transfer if they had 'reason to doubt that the interests of the members and beneficiaries concerned' are not 'adequately protected'.[49] Consequently, this may leave substantial discretionary powers for the local authorities of the jurisdiction of the transferring IORP and could at least result to some extensive (procedural) steps to establish a transfer of pension schemes. It seems that also in this respect the Council has left room for the Member States to shield – at least to a certain extent – the existing local pension sector from cross-border pension activities.

Under the current IORP Directive, the 'social and labour law' that applies is almost entirely that of the Member States themselves.[50] This, in principle, is in line with the aforementioned basis of the IORP Directive under the TFEU which, after all, is aimed at elaborating the relevant freedom of movement provisions for the establishment of an internal market – and which does not, therefore, (principally) concern the development of social protection or measures relating to employment terms. Thus, the system of the Directive is also that pension schemes are governed by the social and labour law of the Member State in which the member of the pension scheme maintains an employment relationship. In addition, under the current Directive the institutions (the IORPs) are regulated by the prudential law of the Member State in which the IORP is established, with the Member State in question having to comply with certain basic norms taken from the IORP Directive.

The IORP II Proposal also formulates a basic framework for prudential supervision, which intends to prevent legal uncertainty in this regard.[51] Member States may no longer, or at least less easily than under the text of the current IORP Directive, create disguised national obstructions by having obvious prudential requirements included in (local) social and labour law in order to obstruct the purport of the IORP Directive in

---

[47] See Article 12(9) of the IORP II Proposal.

[48] See Article 13 of the IORP II Proposal.

[49] See Article 13(5) of the *revised* IORP II Proposal.

[50] See recital 37 of the current IORP Directive and recital 23 of the IORP II Proposal. The extent to which this can actually be viewed as an 'exclusive' power is highly doubtful as even the European prohibition against discrimination, laid down in Article 12 TFEU, is already effective in the national legal systems.

[51] See Article 60 of the *revised* IORP II Proposal, which provides: 'Member States shall ensure that institutions for occupational retirement provision are subject to prudential supervision including the supervision of the following: (a) conditions of operations; (b) technical provisions; (c) funding of technical provisions; (d) regulatory own funds; (e) available solvency margin; (f) required solvency margin; (g) investment rules; (h) investment management; and (i) information to be provided to competent authorities.'

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

this regard. That is a major improvement. The fact is that, in the Netherlands, it was for some time possible to include the Dutch solvency framework for pension funds (*Financieel Toetsingskader*) in the scope of social and labour law.[52] That now seems to have been made impossible.

III.iii Pensions and Fundamental European Rights

The European Commission has not only substantiated the revision of the IORP Directive in strictly economic terms. According to the Commission, the proposal is expressly in line with 'Europe 2020', a strategy formulated by the European Council with the objective of establishing a sustainable, competitive as well as social market economy through structural reforms.[53]

In its Explanatory Memorandum to the IORP II Proposal, the Commission puts forward a highly fundamental consideration. Referring to the Charter of Fundamental Rights of the European Union (the Charter, see below), the Commission states that the IORP II Proposal promotes human rights by protecting retirement provision, and that the proposal will have a positive impact on consumer protection and freedom to conduct business, 'in particular by ensuring a higher level of transparency of retirement provisioning, informed personal financial and retirement planning as well as facilitating cross-border business of IORPs and their sponsors'.[54] In the Explanatory Memorandum the Commission also expressly draws attention to the problem that many European IORP members are not aware that their pension entitlements could be cut (with explicit reference to the situation in the Netherlands) and that they have no idea of the costs incurred for managing their pension schemes.[55] Thus, in invoking fundamental European rights, the Commission is in fact a critical observer of more traditional pension systems that are strongly founded on the aforementioned principle of solidarity, which also applies in the Netherlands. It has already been outlined above that, pursuant to the Dutch Pensions Act, an industry-wide pension fund functions as a collective on the basis of solidarity in which, partly due to the fact that the insurance costs are fully shared, the *ex ante* establishment of purely transparent individual rights is ruled out.[56] For instance, young people's pension entitlements may erode if, faced with a funding

---

[52] See, for example, the Dutch policymakers' plans for developing a new pension vehicle (the *Algemene Pensioen Instelling)*, and www.internetconsultatie.nl.

[53] See also the findings in Case C-341/05 *Laval* [2007] ECR I-11767 [104]–[105] and Case C-438/05 *Viking* [2007] ECR I-10779 [79]–[80], with the finding that the EU also has social objectives; see, for example, Articles 3, 151 and 152 TFEU as well.

[54] See para 1.2 of the Explanatory Memorandum to the IORP II Proposal, with reference to Articles 25, 38 and 16, respectively, of the Charter of Fundamental Rights of the European Union. The EC also notes that the general objective also, in fact, justifies 'certain limitations on the freedom to conduct a business (Article 16)'.

[55] See para 11 of the Explanatory Memorandum to the IORP II Proposal.

[56] This is also expressed in the prohibition against legal 'ring-fencing' by Dutch industry-wide and company pension funds, see Article 123 of the Dutch Pensions Act. An exception to this is provided for PPIs, which may ring-fence schemes; however, this is subject to the restriction that PPIs may not bear biometric risks and, in the Dutch context, are effectively only allowed to administer defined contribution schemes (see also below).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

shortfall or the possibility of one, a pension fund decides (for *social* reasons) to postpone cutting pension entitlements to enable current pensioners' benefits to be maintained (for the time being). The pension fund is thus speculating that, in due course, its financial situation will recover through successful investments or can be offset by demanding higher contributions; however, if such expectations do not materialise, the younger members run the risk of their contributions being increased and/or their entitlements being cut. The recovery and curtailing system of the Dutch pension funds which, in the perception of many members, exhibits little transparency, plays a major role in the debate about the reform of the current Dutch pension system.[57] Thus, the aforementioned fundamental EU rights underpinning the IORP II Proposal should also be part of the current discussion about the reform and the sustainability (under European law) of the Dutch pension system.[58]

III.iv Guarantees

In practical terms, cutting pension entitlements only applies to rights that, in principle, have been assigned unconditionally (guaranteed) – a guarantee that is similar to the way in which pension insurance members can expect a guaranteed pension benefit. Within the pensions sector, such schemes are called defined benefit (DB) schemes. The capital reserves required for such pension funds and other IORPs (as well as for commercial insurers) should, if the returns on the investments are insufficient, ensure that the pension entity can fulfil the obligations it has guaranteed to the member for as long as possible. It should be noted that, under the requirements of the Solvency II Directive, insurers are obliged to guarantee their obligations with a higher degree of certainty than IORPs under the current IORP Directive. This means that commercial insurers' DB solutions are currently more expensive (or potentially so), but that they are backed up by greater financial safeguards.[59]

Schemes that are not guaranteed or insured and whose entitlements are, in principle, directly influenced by the underlying investment results are called defined contribution (DC) schemes. In such schemes, the members directly bear all risks (i.e., both the positive and negative results) of the investments related to their pension entitlements and, in principle, no funding shortfall can occur. Previously, the majority of arrangements offered in the Netherlands were DB schemes; given the higher costs entailed in maintaining greater capital reserves, many parties feel a growing need for DC schemes.

---

[57] See also Article 48 of the IORP II Proposal, subsequently reflected in Article 39 of the *revised* IORP II Proposal, which addresses this issue.

[58] Specifically, this can also have consequences for the legal assessment of the conversion – often referred to as *invaren* ('sailing in') in the Dutch pension debate – of existing pension entitlements into a new structure containing modified pension entitlements which, under the right to property set out in Article 17 of the EU Charter, could in principle be questionable.

[59] Put simply, insurers are obliged to maintain a 99.5% Value at Risk (i.e. theoretical insolvency occurring once every 200 years), whilst the Dutch pensions sector, for example, maintains a 97.5% VaR (i.e. theoretical insolvency occurring once every 40 years). Bridging this difference could entail considerable extra costs (of contributions) for members, especially in light of the already low funding ratios of many pension funds.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

This trend can also be clearly seen in the rest of Europe.[60] However, many Dutch pension funds (and insurers) still maintain the DB schemes begun in the past, and in many sectors DB schemes are still seen as the norm for a 'certain' pension. The big Dutch industry-wide pension funds are still mainly geared towards providing DB schemes.

During the financial and economic crisis, the capital reserves proved to be insufficient and many Dutch pension funds were no longer able to fulfil their obligations: the 'certainty' of the guaranteed DB schemes turned out to be merely relative. In the Dutch literature, the actual performance of the pension funds' applied curtailing and recovery system compared with the safeguards provided in the Dutch Pensions Act and the provisions of the current IORP Directive had already been analysed.[61] If a scheme is underfunded, the IORP Directive includes a recovery system for IORPs, but the actual wording of the Directive does contain restrictions. The recovery system set out in the IORP Directive seems to seek to recover the amount of appropriate assets in order to fully cover the technical provision, whilst the 'cutting' of entitlements in the Dutch context results in a reduction of the pension liabilities on the pension fund's balance sheet.[62] Putting it cautiously, it does not seem to be unreservedly clear whether the current Dutch curtailing and recovery system for DB schemes can be entirely applied in accordance with the IORP Directive. In the Dutch literature, the power to curtail has been defended with a reference to (inter alia) Article 9(3) of the IORP Directive, which provides: 'A Member State may make the conditions of operation of an institution located in its territory subject to other requirements, with a view to ensuring that the interests of members and beneficiaries are adequately protected.'[63] However, in the IORP II Proposal this very provision has been deleted from the text of the Directive. This is in line with the EC's approach to adding transparent, stricter conditions in the revised Directive to rules that can directly affect the position of the individual member of a pension scheme. This issue is also addressed in Article 39 of the *revised* IORP II Proposal which imposes the following requirement on IORPs that issue guarantees to their members (e.g. by means of DB schemes): '… that members are sufficiently informed about the functioning of the respective pension scheme operated by the institution, in particular about: … the conditions regarding guarantees of a given

[60] It should be noted here that, in recent years, investment strategies have been developed that have *de facto* limited the potential 'risks' for members of DC schemes, as the opportunities for benefiting from higher investment returns are potentially higher in DC schemes and thus certain risks, including market risks (e.g. inflation), which cannot unreservedly be avoided in DB commitments, can in fact be offset.

[61] Under the Dutch Pensions Act, curtailing of benefits is, in principle, an *ultimum remedium* (see section 134 of the Dutch Pensions Act), although this is subject to certain caveats; see, for example, PJM Akkermans, 'Korten, afstempelen, versoberen, verminderen: de "kleine lettertjes" onder de loep' [2011] *PensioenMagazine* 22, and JA Gielink, LJP van der Meij, MW Minnaard, EMF Schols and MCJ Witteman, 'Juridische aspecten van korten van pensioenen' [2011] *Tijdschrift voor Pensioenvraagstukken* 8.

[62] See Article 16 of the IORP Directive; here the Directive seems to assume a 'short-term' recovery to 100% cover, whilst the recovery system of Dutch pension and supervisory legislation assumes 'minimum' cover of (approx.) 105%, to be attained within a number of years.

[63] See Gielink et al, note 61 supra.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

investment performance or of a given level of benefits, …; the mechanisms protecting accrued individual entitlements or the benefit reduction mechanisms'. The accent here is on protecting entitlements of the individual member.[64] This raises the question to what extent, for example, the current Dutch curtailing and recovery system, and the collective basis of 'solidarity', will remain sustainable under European law, i.e. under the revised IORP Directive.

III.v Funding Requirements

The approach to 'guarantees' is obviously directly linked to the most important issue that the EC has for the time being refrained from tackling in the IORP II Proposal: formulating stricter ('quantitative') funding requirements for strengthening the solvency of IORPs. The fact is that the required level of capital reserves directly affects the way in which an IORP is able to fulfil and continue fulfilling its obligations and thus the extent to which the cutting of 'guaranteed' pension entitlements can be avoided. This also applies to the funding of Dutch pension funds.

As stated above, in preparing the IORP II Proposal the EC intended, among other things, to use the regulatory insurance framework of the Solvency II Directive as its guideline. This elicited criticism from, in particular, the Dutch and English, as well as, for example, the Irish and German pension sectors. Fearing higher funding requirements, they were also concerned about overly tight regulation under a revised IORP Directive. These countries have for a considerable time already had a (more or less) reasonably developed funded system, with many DB schemes. The criticism was generally that copying the high level of certainty for DB schemes which is required under the Solvency II Directive for insurers (including pension insurers) was not feasible for IORPs in the pensions sector without considerable cost increases (in the absence of a statutory possibility of reducing the DB entitlements, the higher capital reserves would have to be generated from, inter alia, higher pension contributions). It was also pointed out that the legal structuring of guarantees in the pensions sector is strongly dependent on the national (often specifically referred to as social and labour) law applicable to an IORP. In some cases, for instance, the solvency of pension funds can be bolstered by sponsor commitments (e.g. a statutory obligation on the employer to pay in additional funds), thus offsetting possible underfunding of the pension liabilities; and, as discussed above, in the Netherlands it is, in principle, possible on certain conditions to cut pension entitlements in order to bring the pension fund's financial position back into balance.[65] Following this, in 2012–2013, at the Commission's request, EIOPA also began a further investigation into the development of funding requirements with the application of a 'holistic balance sheet', in which the

[64] Under the original IORP II Proposal as presented by the EC, Article 48(2) more explicitly required that (among other things) the IORP would inform the members on the 'nature of the guarantee'. These data should be communicated to the member in a 'pension benefit statement' (see Articles 40 et seq. of the IORP II Proposal), which is somewhat similar to the Dutch 'Uniform Pension Statement' (in Dutch: 'Uniform Pensioen Overzicht').

[65] In this regard the Dutch Ministry of Social Affairs and Employment actually put it to EIOPA that the Dutch 'guaranteed' (DB) schemes should be viewed internationally as DC schemes.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

flexibility used to determine the solvency of an IORP was, where possible, incorporated into a model. This so-called Quantitative Impact Study appeared on the one hand to further confirm the desire of the European Commission (and EIOPA) to develop funding requirements but, on the other hand, it also concluded that, given the complexity of the applied model and the fact that the investigation had been a preliminary one, it would be wise to spend more time studying the matter in further detail before presenting new rules in this regard.[66]

The measures proposed by the EC and EIOPA on the basis of the draft IORP II Directive did not appear to include any new funding requirements, but new developments in this regard could not, on the basis of the IORP II Proposal, be ruled out entirely. It can, for example, be noted that the draft text of Article 30 (Delegated act for the risk evaluation for pensions) of the IORP II Proposal empowered the European Commission to adopt delegated acts.[67] In practice, one of the factors that make it difficult to provide cross-border DB schemes is in fact the differences in the national funding requirements; it thus appears that the scope of this power could extend to the funding requirements. This is furthermore confirmed by the fact that the following recital from the IORP I Directive has also been included in the IORP II Proposal as presented by the EC, which makes in respect of the funding of the IORPs explicit reference to the (more strict) funding of insurance companies discussed above:

> In many cases, it could be the sponsoring undertaking and not the institution itself that either covers any biometric risk or guarantees certain benefits or investment performance. However, in some cases, it is the institution itself which provides such cover or guarantees and the sponsor's obligations are generally exhausted by paying the necessary contributions. In these circumstances, the products offered are similar to those of life-assurance companies and the institutions concerned should hold at least the same additional own funds as life-assurance companies.[68]

As also mentioned above, under the *revised* IORP II Proposal, as agreed by the Council, the provisions on delegating powers for the EC have been deleted, including the deletion of draft Article 30 on delegated acts for the risk evaluation for pensions. It seems therefore that the *revised* IORP II Proposal has taken into account the concerns of some Member States (e.g. the Netherlands and the United Kingdom) on additional funding requirements as discussed above. Moreover, also the wording of the recital cited above has been amended under the *revised* IORP II Proposal, as agreed by the Council: under the current wording proposed by the Council any reference to the more

---

[66] In certain cases, with the application of the model potentially considerable shortfalls in IORPs were discovered; see EIOPA, 'QIS on IORPs', *Preliminary Results for the EC*, EIOPA-BoS-13/021, 9 April 2013, and 'Report on QIS on IORPs', EIOPA-BoS-13/124, 4 July 2013; the Commission's response followed on 23 May 2013; see the European Commission, *Occupational Pension Funds (IORP): Next steps*, MEMO/13/454, 23 May 2013.

[67] See para 3.4 of the Explanatory Memorandum to the IORP II Proposal, *Detailed explanation of the proposal*, regarding Article 30 in Chapter 1 (System of governance).

[68] Recital 30 of the current IORP Directive.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

strict funding requirements of insurance companies in the recital has been deleted.[69] Given the fact that reference to the funding of insurance companies is still part of the current IORP Directive – and if the exclusion of such reference were maintained in a final draft of a (revised) IORP II Directive – this amendment could, from a general policy perspective of the EC to create a level playing field for IORPs and insurers within the European pension market, arguably be qualified as a step back.

The above is moreover also not in line with the general financial-economic policies as adopted over the recent years within the EU. It can be noted that, on the basis of European case law, the solvency problems of the pension funds could also have consequences for the position and liability of the Member States and their public supervisory authorities and, possibly financial consequences as well.[70] This could also be a reason to further reinforce the role of the EC and EIOPA in this regard.

IV. FREEDOM OF MOVEMENT SAFEGUARDED?

One of the recitals of the IORP II Proposal states that an IORP should in principle be free to transfer pension schemes to other IORPs within the EU, subject to authorisation from the authorities of the home Member State in which the IORP transferring the pension scheme is established.[71] Such authorisation especially relates to local social and labour law items, as also discussed above. Thus, if a Dutch pension scheme is transferred to a Belgian IORP, the Belgian supervisory authority may oppose this, and, under certain conditions, the Dutch supervisory authority could withhold authorisation. Furthermore, also permission from the pension fund stakeholders should be obtained, to the extent required by Dutch law. However, due to Dutch national social and labour law, which also under the IORP II Proposal remains at the discretion of the Member States, it will still not be possible to withdraw from a *compulsory* industry-wide pension fund.[72]

The question is to what extent the Dutch system of compulsory membership results in an unauthorised obstacle to the free movement of persons and services. According to the literature, with references to the relevant EU case law, compulsory membership may be justified on the basis of the 'rule of reason' and the social function of a pension

---

[69] Recital 29 of the revised IORP II Directive, as agreed by the Council: the relevant last sentence of recital 29 now reads: 'In these circumstances, the institutions concerned should hold own funds based on the value of technical provisions and risk capital.'

[70] Case C-398/11 *Hogan and others v Minister for Social and Family Affairs*, nyr, ECLI:EU:C:2013:272. In the *Hogan* case the Court ruled in essence that, if employers become insolvent, there has to be a minimum guarantee for members of occupational pension schemes. If a pension fund pays out less than 49% of the amount of the pension benefit that was originally promised, then the Member State may be liable for the shortfall on the basis of (inter alia) the Insolvency Directive (2008/94/EC).

[71] Recital 24 of the *revised* IORP II Proposal.

[72] See Article 12(1) of the IORP II Proposal and Article 20(1) of the current IORP Directive.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

fund in accordance with the principle of solidarity.[73] However, on this basis the Court has held that the relevant compulsory (social) insurance arrangements that are administered by institutions which, in principle, are subject to public supervision and which do not – at least not by definition – operate as independent undertakings, are justified. In principle, however, Dutch industry-wide pension funds operate as independent undertakings and administer compulsory retirement provision in the context of collective bargaining arrangements which have been agreed by the social partners. According to the *Laval* judgment, an obstacle to the freedom of movement which is the result of collective bargaining arrangements would be less readily justified than measures initiated by the Member State itself (or through its intervention).[74] Therefore, it might be doubtful whether compulsory membership as an obstacle to the freedom of movement provisions can be justified under the TFEU.[75] Also with reference to the considerations put forward by the Commission to the IORP II Proposal on the transparency of the pension system in accordance with the EU Charter, the question can therefore be raised whether, given the current social and economic developments, compulsory membership in combination with the solidarity principle in the form of the Dutch average contribution system is still the most appropriate way of organising additional pensions in the Second Pillar.

V. TAX ASPECTS

In general, the different tax treatment of pension schemes in the Member States concerned is also seen as a considerable obstacle to establishing a common pension market in the EU. In practice it can, for example, be difficult for a pension scheme, designed according to the law of one Member State, to comply with the requirements for applying a tax facility in another Member State. And in some cases the operation of various tax regimes of various Member States can, for example, result in double taxation because both the country where the member of the pension scheme (formerly) worked and the country where that recipient of retirement benefits (currently) lives, taxes the income (as the pension is accrued in a different Member State from the one in which (following emigration) retirement benefits are received). In practice, double taxation in such cases can only be prevented (or mitigated) if the Member States in question have concluded a treaty to prevent double taxation. Apart from the treatment of pension schemes, the tax treatment of the pension entities themselves (which may qualify as IORPs) also plays a role. Pension entities are often accorded tax-favourable treatment, for instance an exemption from income and capital gains taxation. Facilities

[73] Case C-350/07 *Kattner Stahlbau* [2009] ECR I-01513; see for example MJCM van der Poel, *De houdbaarheid van verplicht gestelde bedrijfstakpensioenfondsen en beroepspensioenregelingen* (Vrije Universiteit 2013) 58–59. The justification is thus similar to the aforementioned EU case law on EU competition law.

[74] Case C-341/05 *Laval* [2007] ECR I-11767 [84] and case C-438/05 *Viking* [2007] ECR I-10779.

[75] In this regard, an industry-wide pension fund must, under the Dutch Pensions Act, always be structured as a Dutch entity. This constitutes *qualitate qua* an illegitimate exclusion of service providers from other Member States.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

that can limit taxation are also often applicable to the entities in which the pension institutions invest (e.g. investment funds). Given the fact that investments are often made across borders and investment structures are thus subject to various tax regimes, international investment structures in particular (also within the EU) are far from always being entirely tax-neutral.[76]

The tax aspects are left intact under both the current IORP Directive and the IORP II Proposal. The fact is that under the TFEU, taxation, in principle, seems the exclusive domain of the Member States, with harmonising measures only being permissible if they are adopted unanimously.[77] On the other hand, under the TFEU the national tax policy and legislation of the Member States must be in accordance with the provisions on free movement, thus safeguarding the basic premise that cross-border activities and purely national activities be accorded equal treatment (including equal tax treatment). This means, for example, that the payment of pension contributions to an IORP established in another Member State must come under the same tax facility as the payment of pension contributions to a local IORP. On the other hand, double taxation (of, for example, retirement benefits received) cannot therefore, in principle, be avoided in all cases.[78] In the past, the Commission has taken initiatives to achieve further harmonisation on the taxing of pensions, but it has not yet adopted any more far-reaching measures.[79]

VI. THE CHARTER

As stated in Section III.iii, as of 1 December 2009, the Charter of Fundamental Rights of the European Union has legally binding force and, as discussed in the literature, can have direct legal effect in national disputes between individuals in proceedings before the courts of the EU, provided the dispute falls within the scope of Article 51 of the Charter.[80]

---

[76] See the observations regarding the UCITS in the EIOPA PPP report, 34–35. In this regard see also, for example, P Borsjé and W Specken, 'Taxation and Cross-Border Pooling in the EU Pension Sector: From UCITS to IORP' (2013) 15 *Derivatives & Financial Instruments*.

[77] See, e.g., Article 114 para 2 TFEU.

[78] (Additional) taxation that is imposed when the value of pension entitlements is, upon emigration, transferred to another Member State can also pose an obstruction to worker mobility within the internal market. Nor does the current proposal for the Portability Directive (Amended proposal for a Directive of the European Parliament and of the Council on minimum requirements for enhancing worker mobility by improving the acquisition and preservation of supplementary pension rights [2007] COM 0603 final – COD 2005/0214), provide (full) protection.

[79] See, for example, the communication from the EC entitled 'The elimination of tax obstacles to the cross-border provision of occupational pensions' [2001] COM 214.

[80] MA Fierstra, 'Åkerberg Fransson: ruim toepassingsgebied van Handvest op handelingen van lidstaten' (2013) 6 *NTER*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

It can be inferred from a number of judgments[81] that the conditions of Article 51 paragraph 1 of the Charter are fulfilled when a national regulation (1) transposes EU law or (2) 'otherwise' makes reference to EU law. The Charter applies primarily to the institutions and bodies of the Union, but also to Member States when they act in the context of EU law.

The scope of the Charter is rather broad.[82] Apart from the European Convention on Human Rights (ECHR), under the competence of the European Court of Human Rights at Strasbourg, pension beneficiaries across the EU can directly invoke the Charter in the Court of Justice of the EU if fundamental rights are violated. This route has not yet been much highlighted in the literature. An important article in this context is Article 17 of the Charter:

> Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law insofar as is necessary for the general interest.

For example, it could be argued that pension beneficiaries, whose rights have somehow been reduced, could invoke this article. The Explanatory Memorandum to the Charter states that the meaning and scope of the right are 'the same as those of the right guaranteed by the European Court of Human Rights and the limitations may not exceed those provided for there'.[83] It might be worthwhile to investigate whether this is actually the case. There are many cases known where the Court of Justice offers different – and potentially more far-reaching – protection from that of the European Court of Human Rights.[84] Recently, in the case of *Pfleger*, with reference to the free movement of services under the TFEU and Article 52 paragraph 1 of the Charter, in respect of the limitation on the application of (among others) Article 17 of the Charter, the Court of Justice held that:[85]

> [I]n circumstances such as those at issue in the main proceedings, an unjustified or disproportionate restriction of the freedom to provide services under Article 56 TFEU is also not permitted under Article 52(1) of the Charter in relation to Articles 15 to 17 of the Charter.

---

[81] Inter alia Case C-5/88 *Hubert Wachauf v Bundesamt für Ernährung und Forstwirtschaft* [1989] ECR 02609 and Case C-617/10 *Åklagaren v Hans Åkerberg Fransson*, nyr, ECLI:EU:C:2013:280.

[82] MA Fierstra, 'Åkerberg Fransson: ruim toepassingsgebied van Handvest op handelingen van lidstaten' (2013) 6 *NTER*.

[83] CHARTE 4473/00.

[84] For an analysis of the Charter, see D Sarmiento, 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe' (2013) 5 *Common Market Law Review* 1267–1304.

[85] Case C-390/12 *Pfleger*, nyr ECLI:EU:C:2014:281. Specific reference is made to Article 52 para 1 of the Charter: 'Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.'

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

> It follows that, in the present case, an examination of the restriction represented by the national legislation at issue in the main proceedings from the point of view of Article 56 TFEU covers also possible limitations of the exercise of the rights and freedoms provided for in Articles 15 to 17 of the Charter, so that a separate examination is not necessary.

The above seems to indicate that – at least to a certain extent – relevant rights under the Charter would need to be applied in parallel to the free movement principles under the TFEU.

In connection with the above it should also be considered that Article 25 of the Charter contains a specific provision to protect the rights of the elderly:

> The Union recognises and respects the rights of the elderly to lead a life of dignity and independence and to participate in social and cultural life.

To ensure such 'dignity' and 'independence' of the elderly, and their ability 'to participate in social and cultural life', Article 25 of the Charter can be understood to include the relevant arrangements facilitating certain basic pension provisions.[86]

The Charter therefore holds the general (social) framework and commitment of the European Union and its Member States to establish at least a basic, and in any case sustainable, pension provision within the EU.

VII. PERSONAL PENSION PLAN AND POSSIBLE ROADMAP FOR A SOLUTION

At the beginning of 2014, EIOPA issued a voluminous and impressive report (referred to above) entitled the *Personal Pension Plan* (PPP). It seemed that the drafters of the PPP had had some difficulties in establishing a good legal definition of a PPP.

The OECD's definition of a 'private pension plan'[87] and EIOPA's initial definition of a PPP[88] differed considerably. The perspectives of the various stakeholders also differed widely. The difficulty of defining a PPP is also reflected in the wide-ranging legal /regulatory design and tax requirements of PPPs in various jurisdictions.

In EIOPA's PPP report it has now been decided to examine the following definition and to refine the PPP to a greater degree: 'Products which under national law are recognised as having the primary purpose of providing the investor an income in retirement and which entitles the member to certain benefits.'[89] In this regard, EIOPA notes that the term 'investor' must be replaced by a 'more suitable term' and that a PPP

---

[86] It might, e.g., also be further investigated whether the Charter provisions could mitigate the double taxation issues that might arise for pensioners in cross-border situations as set out above; it cannot be ruled out that the Charter could be successfully invoked by a pensioner, and could at least mitigate the effects of double taxation, preventing the (complete) erosion of a basic pension benefit.

[87] www.oecd.org/finance/private-pensions/38356329.pdf.

[88] 'PPP – a pension plan that hosts members only on an individual basis', see para 37, 11 EIOPA, *PPP Report*.

[89] See para 54, 14 of the EIOPA PPP report. This definition was taken from the European Council as used in 'Proposal for a Regulation on key information documents for packaged retail

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

is always understood to be a 'funded product' and that, in principle, a PPP is established on the basis of an agreement between a provider and an individual.[90] The reference made to an 'individual' in this respect could also imply that a solution is to be sought in connection with an individual, i.e., private Third Pillar, pension arrangement instead of an occupational Second Pillar pension arrangements as regulated under the IORP Directive discussed above. However, such is not the only logical understanding of the EIOPA proposal.

A Member State's recognition of a pension plan that has been established under the regime of another Member State can present certain problems in practice.[91] In principle, these could be resolved if, when designing a pension plan, the (common) legal and tax requirements of the different Member States are adhered to as much as possible. In the literature, it has been pointed out that there are practical solutions in this regard, including, for example, a flexible DC plan.[92] The EIOPA PPP report also refers to these.[93] To promote mutual recognition and equal legal and (facilitated) tax treatment of plans originally established under the laws of another Member State, it could be a solution to develop a kind of 'standard' EU pension plan in regard to which it should make no difference at all whether the plan in question qualifies – for local law purposes – as an 'occupational' pension arrangement in the Second Pillar or a 'private' (individual) pension arrangement in the Third Pillar, if it were designed as a flexible DC-arrangement.[94] A PPP could thereby qualify as a 29th or 2nd regime; a completely optional regime, in addition to the existing legal systems of the Member States.[95]

The case for initiating such a 2nd regime, initially on the basis of 'soft law' might be a preferable way. Since, in principle, a measure of this sort can be adopted more quickly by the European Commission (in collaboration with EIOPA), it could provide a

---

investment', 11430/13, 24 June 2013, http://register.consilium.europa.eu/pdf/en/13/st11/st11430.en13.pdf.

[90] EIOPA: 'This does not necessarily exclude products where an employer also makes contributions into the product.'

[91] The recognition of pension plans of (temporarily) transferred workers follows from the operation of the so-called 'Safeguarding Directive' (Directive 98/49/EC on safeguarding the supplementary pension rights of employed and self-employed persons moving within the Community).

[92] H van Meerten and B Starink, 'Cross-Border Obstacles and Solutions for Pan-European Pensions' (2011) 11(1) *EC Tax Review*.

[93] See para 613, EIOPA, *PPP report*.

[94] For example, in respect of the UCITS entities, recent Court of Justice rulings may give room for the development of the mutual recognition and (consequently) equal tax treatment of UCITS on the basis of its common EU regulatory framework with reference to the free movement provisions under the TFEU, as argued in P Borsjé and W Specken, 'Taxation and Cross-Border Pooling in the EU Pension Sector: From UCITS to IORP' (2013) 15 *Derivatives & Financial Instruments*; see in this respect Joined Cases C-338/11 to C-347/11 *Santander*, nyr, ECLI:EU:C:2012:286; Case C-190/12 *EMS of DFA Investment Trust Company*, nyr ECLI:EU:C:2014:249. A similar development might be anticipated as to the equal tax treatment of a PPP on the basis of a common EU regulatory framework, i.e. such as contemplated under a 29th or 2nd regime.

[95] Cf. furthermore also G Dietvorst, 'Proposal for a Pension Model with a Compensating Layer' (2007) 3 *EC Tax Review*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

further stimulus for the European pension market in the short term. It may be recalled that there are many examples of soft law, which in principle is not formally binding, having legal effect. In general, certain types of soft law, for example recommendations, are in principle deprived of legally binding force (as reflected in Article 288 TFEU), but the Court of Justice considered that this did not mean that they were deprived of legal effects as well: 'However, national courts are bound to take those recommendations into consideration in order to decide disputes submitted to them, in particular where they are capable of casting light on the interpretation of other provisions of national or Community law.'[96]

The EU Court noted that soft law instruments lay down rules of conduct that are binding on the institutions and Member States because they create legitimate expectations, enhance legal certainty and equality, and ensure respect for human rights and non-retroactivity of laws.[97] Furthermore, in the field of competition law, there are many examples of soft law having, as stated above, legal effect.[98]

Along with this a (parallel) procedure could eventually be developed to incorporate elements of such a 2nd regime into a Directive or regulation, thereby expediting the requisite further cooperation and coordination between the Member States. Insofar as the 2nd regime can be termed a flexible financial product, the Member States would have to be able to facilitate the applicability of the 2nd regime under their own social and labour law. Here, too, formulating a 2nd regime with the information and transparency requirements envisaged in the draft IORP II Proposal could also be brought into line with this.

The flexible character of the 2nd regime plan should make relevant servicing in principle independent of the status of a particular (pension) servicing body, subject to sufficient and appropriate safeguards. A flexible DC plan can, in accordance with the legal character of the local pension system of the Member State in question, be transferred to a (more traditional) pension fund or insurer, but also, for example, to an investment fund (or similar) entity with an asset manager and separate custodian, whereby the framework of the IORP Directive, the Solvency Directive or perhaps even the UCITS Directive (or in combination with this Directive) can provide the specific regulatory framework for the entity in question. In this regard it should be noted that it was precisely in relation to the application of the VAT exemption on management services rendered to special investment funds, that the ECJ recently ruled that the character of a DC pension entity can be so similar to a UCITS, to the extent that a DC pension entity can also be entitled to this VAT exemption.[99] It should be borne in mind here that this exemption under the VAT Directive in fact served to limit the VAT burden on the manager for the collective asset management for entities qualifying as a UCITS,

---

[96] See Case C-322/88 *Grimaldi* [1989] ECR 04407 [18].

[97] O Stefan, *Soft Law in Court Competition Law, State Aid and the Court of Justice of the European Union* (Kluwer Law International 2013).

[98] An interesting overview is written by A-G Kokott in her opinion in Case C-226/11 *Expedia*, nyr, ECLI:EU:C:2012:544.

[99] Case C-464/12, *ATP Pension Service A/S v Skatteministeriet*, nyr, ECLI:EU:C:2014:139.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

or entities that are sufficiently similar to the characteristics and activities of a UCITS.[100]

Regarding the flexibility outlined above, a distinction will in certain cases have to be made between the accrual phase of the plan and the benefits phase whereby, if the pension has, for example, been accrued via a UCITS, the benefits phase can be administered by a suitably equipped party (e.g., an insurer or perhaps a relevant IORP).[101]

VIII. EUROPEAN PENSIONS UNION

The development of a European 2nd regime for a PPP can, in combination with the revision of the current IORP Directive and the above-described general (social) framework of the Charter, form the basis for a European Pensions Union. The fact that, for the present, the revision of the IORP Directive is not focused on elaborating further solvency requirements for IORPs has already been discussed above. That also seems to be of lesser relevance in the promotion of a cross-border DC plan. If the IORP II continues in the current direction, with additional requirements apparently only being established with regard to the manner and conditions under which the plan is to be implemented, additional requirements as to the solvency or legal design of the IORP vehicle that implements the plan could be of lesser importance. It could be sufficient for the institution itself to elaborate and adopt the relevant information and governance requirements under the (revised) IORP Directive, with consideration also having to be given to the role that could be played by insurers and investment entities – and any other possible (financial) service providers, such as banks, in accordance with the obligations that these parties have under the relevant European regulations and Directives. This would enable the outline of a future European Pensions Union to slowly, but effectively, be drawn up.

Consistent with the structure of a European Pensions Union, a European 2nd regime pension plan would actually provide protection to members of European pension schemes in accruing pensions and enjoying retirement benefits. It would also provide support to the pension sector and internationally operating companies with regard to cross-border activities. More generally, this would also benefit Europe's economic stability and social objectives.

IX. CONCLUSION

The initiative of the European Commission to revise the IORP Directive is in line with a broad trend in both the national and the Brussels legislatures to obtain a greater hold on financial market parties and service providers following the recent economic and

[100] See Article 135(10)(g) of Directive 2006/112/EC on the common system of value added tax.

[101] Preferably, the alternative of continuing investment activities in the benefits phase, too, could be opted for.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

financial crisis. As regards the pensions sector, the sustainability of retirement provision also affects the stability of the European economy. On the other hand, money can in fact be made available from funded pension accrual for long-term growth-enhancing investment.[102] In this regard it must also be considered that the structure of the European economy and labour market has been changing rapidly in recent years: many members of pension schemes no longer work for the same employer or in the same industry for their entire careers, or they even set up their own companies as self-employed persons. It is therefore debatable whether the traditional collective solidarity-based approach to pension solutions will still prove to be a viable model.

The European Commission is clearly heading in a different direction. The IORP Directive, for example, also provides for the possibility of organising an IORP for self-employed persons. The Dutch legal framework, however, is still not ready for this. In the Netherlands it is still very much the prevailing view that, as an entrepreneur, a self-employed person should arrange his own pension. The question is to what extent this outlook is still in line with the EU's social objectives.

The Commission's efforts raise a number of fundamental questions about the way in which the existing Dutch pension system is organised, and it may be understood as an exhortation to take further steps to reform it. In this regard the underlying premises of compulsory membership and the particulars of the curtailing and recovery system of the Dutch system will have to be examined, even though they are in part based on Dutch social and labour law. In the interest of members of pension schemes, European law requires a sustainable, balanced and transparent system.

Establishing (gradually) a European Pensions Union in which the pension law of the Member States would be provided with a stronger European framework and a clearer (basic) norm, introduced through a 2nd regime for a PPP, in combination with a revised IORP Directive, would be a welcome development. This could, for example, preclude the situation in which retirement provisions are insufficiently facilitated or even negligently managed in a certain European Member State – other than the one in which pensions were accrued – with the attendant adverse socio-political consequences. Potential economic (and social) problems of this sort would also entail risks for the state budget in question, which in turn could have consequences for the European financial system as a whole.

The pension issue therefore calls for a European approach, and the first steps have been undertaken to laying the foundations of a European Pensions Union.

BIBLIOGRAPHY

Akkermans, PJM (2011), 'Korten, afstempelen, versoberen, verminderen: de "kleine lettertjes" onder de loep' *PensioenMagazine* 22.

Borsjé, P and W Specken (2013), 'Taxation and Cross-Border Pooling in the EU Pension Sector: From UCITS to IORP', *Derivatives & Financial Instruments* **15** 27–34.

Charmon, C (2013), 'Comitologie onder het Treaty of Lisbon', *Tijdschrift voor Europees en Economisch Recht*, **2** 2013.

Dietvorst, G (2007), 'Proposal for a Pension Model with a Compensating Layer', *EC Tax Review* 3.

[102] See para 1.1 of the Explanatory Memorandum to the IORP II Proposal.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

EIOPA (2014), *Towards an EU Single Market for Personal Pensions. An EIOPA Preliminary Report to COM*, EIOPA.
European Commission (2008), *Dealing with the Impact of an Ageing Population in the EU*, Brussels: European Commission.
European Commission (2010), *Towards Adequate, Sustainable and Safe European Pension Systems*, SEC 830, Brussels: European Commission.
European Commission (2012), *An Agenda for Adequate, Safe and Sustainable Pensions*, [2012] COM 55 final Brussels: European Commission.
European Commission (2014), *A Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision*, [2014] COM 167 final, Brussels: European Commission.
European Council (2014), *A Proposal for a Directive of the European Parliament and of the Council on the activities and supervision of institutions for occupational retirement provision (recast),* Brussels: European Council.
Fierstra, MA (2013), 'Åkerberg Fransson: Ruim toepassingsgebied van Handvest op handelingen van lidstaten', *NTER* 6.
Gielink, JA, LJP van der Meij, MW Minnaard, EMF Schols and MCJ Witteman (2011), 'Juridische aspecten van korten van pensioenen', *Tijdschrift voor Pensioenvraagstukken* 8.
Heemskerk, M (2013), 'Op zoek naar de grenzen van de solidariteit in het aanvullend pensioen', *WPNR* 6968.
Kok, DL and JA Gielink, 'Het nieuwe pensioencontract en de Pensioenfondsenrichtlijn; buffers verplicht?', *Tijdschrift voor Pensioenvraagstukken* 14.
Prechal, S and SA de Vries (2008), 'Viking/Laval en de grondslagen van het internemarktrecht', *Tijdschrift voor Europees en Economisch Recht* 11.
Rötting, M and C Lang (2012), 'Das Lamfalussy-Verfahren im Umfeld der Neuordnung der europäischen Finanzaufsichtsstrukturen', *Europäische Zeitschrift für Wirtschaftsrecht* **23** 8–14.
Sarmiento, D (2013), 'Who's Afraid of the Charter? The Court of Justice, National Courts and the New Framework of Fundamental Rights Protection in Europe', *Common Market Law Review* **5** 1267–1304.
Stefan, O (2013), *Soft Law in Court Competition Law, State Aid and the Court of Justice of the European Union* Alphen a/d Rijn: Kluwer Law International.
Tuijp, JHH (2014), 'Beschikbare premieregeling beter dan toegezegde uitkeringsregeling', *Pensioen & Praktijk*, 4.
Van den Brink, A, H van Meerten and S de Vries (2011), *Regulating Pensions; Why the EU Matters*, Tilburg: Netspar.
Van der Poel, MJCM (2013), *De houdbaarheid van verplicht gestelde bedrijfstakpensioenfondsen en beroepspensioenregelingen*, Amsterdam: Vrije Universiteit.
Van Haersolte, JC (2006), 'Een mammoettanker is de mistige haven van Lissabon binnengevaren: de afsluiting van het Actieplan Financiële Diensten', *Nederlands Tijdschrift voor Europees Recht* 102–109 and 141–152.
Van Meerten, H (2013), 'The Scope of the IORP Directive', in U Neergaard, E Szyszczak, JW van de Gronden and M Krajewski (eds), *Social Services of General Interest in the EU*, The Hague: TMC Asser Press.
Van Meerten, H and P Borsjé (2013), 'Het "nieuwe" pensioencontract: de reële ambitieovereenkomst en andere alternatieven', *PensioenMagazine* 157.
Van Meerten, H and A Ottow (2010), 'The Proposals for the European Supervisory Authorities: The Right (Legal) Way Forward?', *Tijdschrift voor Financieel Recht* **1**.
Van Meerten, H and B Starink (2011), 'Cross-Border Obstacles and Solutions for Pan-European Pensions *EC Tax Review* **1**.
Van Meerten, H and J van Haersolte (2010), 'Zelfrijzend Europees bakmeel: de voorstellen voor een nieuw financieel toezicht', *Nederlands Tijdschrift voor Europees Recht* **2**.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:54:28PM
via University College London (UCL)

16. EU migrants and destitution: The ambiguous EU objectives

Herwig Verschueren

I. INTRODUCTION

The right of EU citizens to move freely within the EU Member States has evolved from a right for economically active persons within the context of Europe's economic integration to a right for all EU citizens whether or not they are economically active. In parallel, the fight against poverty and social exclusion is supposed to be at the core of the EU's political agenda. Yet, the right to free movement of economically non-active persons and to equal treatment with the host State's citizens with regard to social benefits is subject to them having sufficient resources so as not to become an unreasonable burden on the host State's social assistance system. As a result, in practice the right to free movement could very well become impossible for indigent people, which would amount to ambiguity between these two policy goals.

The issue is also high on the political agenda. In April 2013 the Ministers of the Interior of four Member States (Austria, Germany, the Netherlands and the UK) sent a letter to the Irish Council presidency asking for an urgent discussion on the EU rules regarding the access of Union citizens recently arrived in another Member State to social benefits in that State.[1] On 14 October 2013 the Commission published a study on this issue.[2] Both in the literature and consultations with the stakeholders it found little evidence to suggest that the main motivation of EU citizens to migrate and reside in a different Member State is benefit related as opposed to work or family related. On 25 November 2013, in the same political context, the Commission further published a Communication on the free movement of EU citizens, which proposed five actions to help national and local authorities to effectively apply EU free movement rules and use available funds on the ground.[3] This communication was largely endorsed by the Council of Ministers' meeting of 5–6 December 2013.[4]

[1] Council document No 10313/13.

[2] ICF and Milieu Ltd, *A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU-migrants to special non-contributory cash benefits and healthcare granted on the basis of residence*, 2013. The study is available at: http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes#!.
This is also confirmed in other studies. See for instance: D Bräuninger, *Debate on free movement. Does the EU need new rules on social security co-ordination?* (Deutsche Bank 2015).

[3] COM(2013) 837.

[4] See minutes at: www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/jha/139938.pdf.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

However, based on very anecdotal evidence, politicians and the popular press in several Member States openly criticised the fact that Union citizens from other Member States wanted to make use of the social assistance schemes of the host State. It is not uncommon for migrations of this kind to be called 'benefit tourism'. Some Member States' political leaders openly proposed to amend the rules on free movement, including the Treaty provisions, not only for economically inactive Union citizens but also for workers.[5]

This chapter will analyse the ambiguity within the Union's policy goals of free movement and the combating of poverty and social exclusion. It will start by reiterating the legal meaning of the right to free movement as well as the EU policy commitment to combat poverty. Next, it will examine the current rules and case law of the Court of Justice on the right to minimum subsistence benefits for migrant workers and persons who can rely on that status. The sometimes blurred definition in EU law of who is economically active and who is not will also be examined. The chapter will then look into the possibilities and limitations for indigent, economically inactive migrant Union citizens to obtain a right to reside in another Member State and have access to social minimum benefits there. It will critically analyse the balance that the Court of Justice tried to strike in its recent case law between the free movement rights and the Member States' interest in limiting access to their solidarity systems. Finally, the chapter presents some ideas and proposals on how this ambiguity and these contradictions could be solved so as to guarantee the right to free movement for all, including the poor, and to prevent migration leading to destitution.

II. THE RIGHT TO FREE MOVEMENT WITHIN THE EU AS A FUNDAMENTAL RIGHT

The right to free movement within the EU has its origin in the Treaty of Rome of 1957, which introduced the right for workers and self-employed persons to move from their home state to another Member State in order to pursue an economic activity there. This right was established in the context of the economic integration through the free movement of factors of production, including labour. It was laid down in Articles 48 and 52 of the original EEC Treaty, currently Articles 45 and 49 TFEU. These provisions also include the principle of non-discrimination on grounds of nationality.[6]

This purely economic integration context was complemented in the Maastricht Treaty of 1992 by a more politically oriented integration, of which the establishment of European citizenship was the most visible expression. Every person holding the nationality of a Member State automatically obtains Union citizenship (Article 8 EEC,

[5] See for instance the proposals formulated on 28 November 2014 by D Cameron, Prime Minister of the UK, at www.bbc.com/news/uk-politics-30224493. See 'Editorial Comments. The Free Movement of Persons in the European Union: Salvaging the Dream while Explaining the Nightmare' (2014) 51 *CML Rev*, 729–740.

[6] See *inter alia*: Case 305/87 *Commission v Greece* [1989] ECR 1461 [13]; Case C-336/96 *Gilly* [1998] ECR I-2793 [38]; Case C-138/02 *Collins* [2004] ECR I-2703 [55]; Case C-240/10 *Schulz-Delzers and Schulz* [2011] ECR I-8531 [29] and Case C-367/11, *Prete* nyr [19].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

now Article 20 TFEU). A key element of this European citizenship was the creation of the Union citizens' right to move and reside freely within the territory of the Member States, irrespective of the exercise of an economic activity, but subject to the limitations and restrictions laid down by Union law (Article 8A EEC Treaty and now Article 21 TFEU). This right is also enshrined in Article 45 of the Charter of Fundamental Rights of the EU.

The Court of Justice has recognised the direct effect of Article 21 TFEU, thus confirming that this right is conferred directly on every citizen of the Union.[7] The Court of Justice also observed that citizenship of the Union confers on each citizen a primary and individual right to move and reside freely within the territory of the Member States.[8] The Court of Justice qualified this freedom to move and reside within the territory of the Member States as a fundamental freedom guaranteed by the Treaty,[9] which must be interpreted broadly.[10] Accordingly, limitations and conditions laid down in EU law must be interpreted restrictively and applied in accordance with the principle of proportionality.[11] In *Grzelczyk* the Court stated that the status of citizen of the Union is destined to be the fundamental status of nationals of the Member States, a statement which later became paradigmatic, since it was repeated on numerous occasions in subsequent case law.[12] The Court also added that it is meant to enable those who find themselves in the same situation to enjoy the same treatment in law irrespective of their nationality, subject to such exceptions as are expressly provided for.[13]

So the right to move and reside freely on the territory of the Member States and the right to equal treatment is firmly endorsed in the Treaty provisions as well as in the case law of the Court of Justice as a fundamental right of every EU citizen, irrespective of the exercise of an economic activity. It has constitutional status in EU law.[14]

---

[7] Case C-413/99 *Baumbast* [2002] ECR I-7091 [84] et seq.

[8] Case C-162/09 *Lassal* [2010] ECR I-9217 [29]; Case C-434/09 *McCarthy* [2011] ECR I-3375 [27]; Joined Cases C-424/10 and C-425/10 *Ziolkowski and Szeja* [2011] ECR I-14035 [35]–[36] and Case C-220/12 *Thiele Meneses* nyr [19].

[9] See recently: Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* nyr [25]; *Thiele Meneses, supra* note 8 [20] and Case C-275/12 *Elrick* nyr [20].

[10] See *inter alia* Case C-200/02 *Zhu and Chen* [2004] I-9925 [31]; Case C-408/03 *Commission v Belgium* [2006] I-2647 [41].

[11] *Baumbast*, *supra* note 7 [91]; *Zhu and Chen, supra* note 10 [32]; *Commission v Belgium*, *supra* note 10 [39]; *Lassal*, *supra* note 8 [29]–[31] and Case C-140/12 *Brey* nyr [70].

[12] Case C-184/99, *Grzelczyk* [2001] ECR I-6193 [31]. See also: *Baumbast*, *supra* note 7 [82]; Case C-148/02 *Garcia Avello* [2003] I-11613 [22]; *Zhu and Chen*, *supra* note 10 [25]; Case C-135/08 *Rottmann* [2010] I-1449 [43]; *Prete*, *supra* note 6 [24]; Case C-46/12 *L.N.* nyr [27]; *Prinz and Seeberger*, *supra* note 9 [24]; *Elrick*, *supra* note 9 [19] and Case 333/13 *Dano* nyr [58].

[13] *Grzelczyk*, *supra* note 12 [31]; Case C-224/98 *D'Hoop* [2002] ECR I-6191 [28]; *Garcia Avello*, *supra* note 12 [22]–[23]; *Collins*, *supra* note 6 [61]; Case C-224/02 *Pusa* [2004] ECR I-5763 [16]; *Prete*, *supra* note 6 [24] and *Dano*, *supra* note 12 [59]–[60].

[14] See explicitly A-G Wahl's opinion of 12 December 2013 in Case C-507/12 *Saint-Prix*, [2].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

III. THE FIGHT AGAINST POVERTY AS A CENTRAL POLICY OBJECTIVE OF THE EU

Ever since the launch of the Lisbon Strategy in 2000 the EU has paid full regard to the fight against poverty and social exclusion when formulating policy objectives and instruments. It was a central theme within the context of the Open Method of Coordination in the field of social protection and social inclusion as well as in the employment strategy.[15] This objective was further confirmed in 2010 by the conclusions of the European Council of 17 June 2010 on the Europe 2020 Strategy.[16] Indeed, the European Council adopted an EU headline target for promoting social inclusion, in particular through the reduction of poverty, by aiming to lift at least 20 million people out of the risk of poverty and exclusion by 2020. This was also taken on board by the Europe 2020 Strategy Integrated Guidelines, including the Broad Guidelines for the Economic Policies and the Guidelines for the Employment Policies adopted by the Council on 21 October 2010, in particular Guideline 10 'Promoting social inclusion and combating poverty'. The implementation by the Member States of these guidelines is monitored every six months in the so-called 'European Semester'.[17]

In addition, on 16 December 2010 the European Commission adopted a communication on 'The European Platform against Poverty and Social Exclusion'.[18] This communication presents different policies to contribute to the goal of reducing poverty and increasing inclusion and also proposes a number of actions. These policy goals were endorsed by the Council of Ministers in its conclusions on this platform of 7 March 2011[19] and further implemented by actions initiated by the Commission.[20]

Later, in 2013, the European Commission started a debate on the so-called 'social investment package', the aim of which is to contribute to the target of lifting at least 20

---

[15] For analysis of these strategies, see among others: K Armstrong, *Governing Social Inclusion. Europeanization through Policy Coordination* (Oxford University Press 2010); H Frazer, E Marlier and I Nicaise, *A Social Inclusion Roadmap for Europe 2020* (Garant 2010); M Heidenreich and P Zeitlin, *Changing European Employment and Welfare Regimes: the Influence of the Open Method of Coordination on National Labour and Social Welfare Reforms* (Routledge 2009).

[16] See: www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/115346.pdf. See also *Communication from the Commission of 3 March 2010, Europe 2020 – A strategy for smart, sustainable and inclusive growth* [2010] COM 2020.

[17] For an overview of the country-specific recommendations for 2014: *Communication from the Commission of 2 June 2014, 2014 European Semester: Country-specific recommendations. Building growth* [2014] COM 400.

[18] Communication from the Commission of 16 December 2010, *The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion* [2010] COM 758 final.

[19] See: http://register.consilium.europa.eu/pdf/en/11/st07/st07434-re01.en11.pdf.

[20] See for a recent account of these actions: European Commission, DG EMPL, *European platform against poverty and social exclusion. Platform actions ongoing as of July 2013*, available, together with other details on the work of the platform at: http://ec.europa.eu/social/main.jsp?catId=961. See also Communication from the Commission of 5 March 2014, *Taking stock of the Europe 2020 strategy for smart, sustainable and inclusive growth* [2014] COM 130.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

million people out of poverty and social exclusion by 2020.[21] 'Promoting social inclusion, combating poverty and any discrimination' has also been confirmed as a thematic objective for the European Structural and Investment – 'ESI-Funds' by Regulation 1303/2013 of 17 December 2013.[22]

The main objective of these European policy initiatives is to support the Member States in their national policies to combat poverty. However, they do not have a direct impact on legal claims for financial or other support by persons faced with poverty or social exclusion. Still, in the meantime these objectives have found their way into legal instruments of the EU, and more specifically into the Treaties as amended in the Lisbon Treaty, which came into force on 1 December 2009. Article 9 TFEU declares that 'in defining and implementing its policies and activities, the Union shall take into account requirements linked to … the fight against social exclusion …'.[23] Furthermore, Article 3(3) TEU states that the construction of the internal market is to be realised by means of policies based on 'a highly competitive social market economy, aiming at full employment and social progress'. This article moreover confirms that: 'It [ie the EU] shall combat social exclusion …'. Article 151(1) TFEU also refers to the combating of social exclusion as an objective of the Union and the Member States. These goals are also reflected in the Charter of Fundamental Rights, which in its Article 34(3) says that 'in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national law and practices'. Furthermore, Article 1 of the Charter of Fundamental Rights states that human dignity is inviolable and must be protected and respected.[24]

---

[21] Communication from the Commission of 20 February 2013, *Towards Social Investment for Growth and Cohesion including implementing the European Social Fund 2014–2020* [2013] COM 83.

[22] [2013] OJ L 347/320.

[23] Advocate-General Cruz Villalon qualified the provision of Article 9 TFEU as a 'social obligation': Case C-515/08 *dos Santos Palhota* [2010] ECR I-9133, Opinion of A-G Cruz Villalon [51]–[52]. See on the meaning of this provision M Dawson and B De Witte, 'The EU Legal Framework of Social Inclusion and Social Protection', in B Cantillon, H Verschueren and P Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2012) 54–57; P Vielle, 'How the Horizontal Clause can be made to Work: The Lessons of Gender Mainstreaming', in N Bruun, K Lörcher and I Schömann (eds), *The Lisbon Treaty and Social Europe.* (Hart 2012) 105–121.

[24] In a recent judgment the Court of Justice referred to this provision and confirmed that the observance of fundamental rights, in particular the requirement of Article 1 of the Charter of Fundamental Rights of the European Union, pursuant to which human dignity must be respected and protected, precludes asylum seekers from being deprived of the protection of the minimum standards laid down by Directive 2003/9. The Court of Justice deduces from Article 1 of the Charter and from the provision of this directive that the financial aid granted to asylum seekers must be sufficient to ensure a dignified standard of living and adequate health of the applicants and capable of ensuring their subsistence. See Case C-79/13 *Saciri and others*, nyr [35]–[42].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

There is no doubt that the fight against poverty and social exclusion is a policy objective which is high on the political agenda of the European institutions and supported by provisions in the Treaties as well as in the Charter.[25]

IV. ACCESS TO MINIMUM SUBSISTENCE BENEFITS FOR MIGRATING EU CITIZENS

Since the right to move and reside freely within the EU Member States is a fundamental right for all EU citizens and the fight against poverty and social exclusion is at the core of the proclaimed EU policy objectives, we should ask ourselves to what extent these two goals are unambiguously combined, more specifically in the legal provisions and case law on the free movement of persons.

From a legal point of view a central role is played by the provisions in primary and secondary EU law on the right to equal treatment with the citizens of the host State. Indeed, the EU did not, and has no power to, adopt any harmonised system of social minimum benefits nor any form of financing these systems of the Member States. Therefore, EU law does, in principle, not detract from the Member States' powers to organise their social security and social assistance systems, including minimum income schemes. However, the Court of Justice has always emphasised that the Member States must nevertheless comply with EU law when exercising these powers.[26] The question we would like to address in this chapter is to what extent the EU equal treatment provisions also guarantee the right to social benefits intended to support indigent migrants. What is the balance between the claim for equal treatment and the concerns of the Member States to protect their welfare systems against the burden laid upon them by such claims from migrants coming from other Member States?

We will have a closer look at the legal debate on these questions. When answering these questions, it is still necessary to make a distinction between economically active persons (and the members of their families) and those who are economically inactive. Even if this dividing line is not always clear and there is still a grey area between these two categories of EU citizens, the distinction continues to be a decisive factor. Our

[25] For a recent account of these policy goals and their implementation by the European institutions and the Member States see among others: B Cantillon and F Vandenbroucke (eds), *Reconciling Work and Poverty Reduction. How Successful Are European Welfare States?* (Oxford University Press 2014). See also B Cantillon and N Van Mechelen, 'Between Dream and Reality. On Anti-Poverty Policy, Minimum Income Protection and the European Social Model', in B Cantillon, H Verschueren and P Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2012) 173–204; P Copeland and M Daly, 'Varieties of Poverty Reduction: Inserting the Poverty and Social Exclusion Target into Europe 2020' (2012) 22 *Journal of European Social Policy* 273–287; R Peña-Casas, 'Europe 2020 and the Fight against Poverty and Social Exclusion: Fooled into Marriage?' in D Natali and B Vanhercke (eds), *Social Developments in the European Union 2011* (ETUI 2012) 159–185. See also the Commission's report *Employment and Social Developments in Europe 2014* (European Union 2015).

[26] See for instance Case C-158/96 *Kohll* [1998] ECR I-1931 [17]–[19] and Case C-228/07 *Petersen* [2008] ECR I-6989 [42].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

analysis will more specifically concentrate on the meaning of and case law on the above-mentioned Treaty provisions as well as on secondary law instruments such as Regulation 1612/68 on the free movement of workers,[27] which was recently replaced by Regulation 492/2011[28] and Directive 2004/38 on residence rights for EU migrants and the members of their families.[29] They contain clauses on the prohibition of discrimination on grounds of nationality to be applied by the host State vis-à-vis workers and citizens of another Member State.[30] This chapter will also analyse the meaning of the provisions in the EU social security coordination system laid down in Regulation 883/2004.[31]

IV.i The Right to Minimum Subsistence Benefits in the Host State for Indigent Migrant Workers

Regulation 1612/68, now Regulation 492/2011, concerns the rights of workers and their family members who have made use of the right of free movement. This regulation does not only regulate the access to the labour market in the host State, but also the legal position of migrant workers and their family members. They can invoke the prohibition of discrimination on grounds of nationality, which is also included in Article 45(2) TFEU. This ban on discrimination refers not only to working conditions, but also to all social and tax advantages granted by the legislation of the Member State of employment (Article 7(2) Regulation 1612/68, now Regulation 492/2011). The Court of Justice considers social assistance to be such a social advantage.[32]

The personal scope of these provisions has been interpreted very broadly by the Court of Justice. Any person pursuing activities which are real and genuine, to the exclusion of activities on such a small scale as to be regarded as purely marginal and ancillary, must be regarded as a 'worker'.[33] The origin of the funds from which the

---

[27] Council Regulation (EEC) 1612/68 of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ L275/2 (hereinafter Regulation 1612/68).

[28] European Parliament and Council Regulation (EU) 492/2011 of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L141/1 (hereinafter Regulation 492/2011). This new regulation only codified the previous provisions of Regulation 1612/68, and did not alter their wording or legal meaning.

[29] European Parliament and Council Directive 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L158/77; 1st corrigendum [2004] OJ L228/35; 2nd corrigendum (only for the English version) [2005] OJ L197/34 (hereinafter Directive 2004/38).

[30] Article 7(2) Regulation 1612/68, Article 7(2) Regulation 492/2011 and Article 24 Directive 2004/38.

[31] European Parliament and Council Regulation (EC) 883/2004 of 29 April 2004 on the coordination of the social security systems [2004] OJ L200/1 (hereinafter Regulation 883/2004).

[32] Case 249/83 *Hoeckx* [1985] ECR 973 and Case 316/85 *Lebon* [1987] ECR 2811.

[33] For early statements of this rule, see, *inter alia*, Case 139/85 *Kempf* [1986] ECR 1741 [13]; Case 66/85 *Lawrie-Blum* [1986] ECR 2121 [16]. See also Case 197/86 *Brown* [1988] ECR 3205 [21]; Case C-292/89 *Antonissen* [1991] ECR I-745 [11]; Case C-3/90 *Bernini* [1992] ECR I-1071 [14]; Case C-413/01 *Ninni-Orasche* [2003] ECR I-13187 [23]; *Petersen, supra* note 26 [45] and, most recently, *L.N.*, *supra* note 12 [39].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

remuneration is paid or the limited amount of that remuneration cannot have any consequence in regard to whether or not the person is a 'worker'.[34] The fact that the income from employment is lower than the minimum required for subsistence does not prevent the person in such employment from being regarded as a 'worker' within the meaning of Article 45 TFEU, Regulation 1612/68 and, now, Regulation 492/2011.[35] This is also the case when the person in question seeks to supplement that remuneration by other means of subsistence such as financial assistance drawn from the public funds of the State in which he/she resides.[36] Furthermore, with regard to the duration of the activity pursued, the fact that employment is of short duration cannot, in itself, exclude that employment from the scope of Article 45 TFEU.[37] Moreover, for the Court of Justice the income can also consist of an indirect contribution, such as board and lodging.[38] This is standing case law, more recently confirmed by the Court of Justice.[39,40]

Yet, this case law also implies that it is not always easy to draw the line between 'work' that falls under these definitions and 'work' that does not.[41] How many hours a week does a person have to work for his/her employment to be considered as 'real and genuine' and not as 'purely marginal and ancillary'? Chores in return for food, lodging and pocket money were considered to be 'work' in *Steymann* but not in *Trojani*.[42] And in *Bettray* 'work merely as a means of rehabilitation and reintegration' was not considered by the Court of Justice as an economic activity. It is also clear from the definition of 'worker' that volunteers are excluded since they do not receive any remuneration, despite the fact that they may contribute to the host State's development.[43]

---

[34] Case 344/87 *Bettray* [1989] 1621 [15]; Case C-10/05 *Mattern and Cikotic* [2006] ECR I-3145 [22].

[35] Case 53/81 *Levin* [1982] ECR 1035 [15]–[16]; Case C-317/93 *Nolte* [1995] ECR I-4625 [19].

[36] *Kempf*, *supra* note 33 [14].

[37] Case C-3/90 *Bernini* [1992] ECR I-1071 [16]; Case C-413/01 *Ninni-Orasche*, *supra* note 33 [25].

[38] Case 196/87 *Steymann* [1988] ECR 6159.

[39] Cases C-22/08 and C-23/08 *Vatsouras and Koupatantze* [2009] ECR I-4585 [26]–[29] and *L.N., supra* note 12.

[40] The same case law also applies if EU migrants are self-employed persons: Case 63/86 *Commission v Italy* [1988] ECR 29, and Cases C-4/95 and C-5/95 *Stöber and Piosa Pereira* [1997] ECR I-511.

[41] See also: L Nogler, 'Rethinking the *Laurie-Blum* Doctrine of Subordination: A Critical Analysis Prompted by Recent Developments in Italian Employment Law' (2010) 26 *International Journal of Comparative Labour Law and Industrial Relations* 83–101; C O'Brien, 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model' (2009) 46 *CML Rev* 1107–1141; T Van Peijpe, 'EU Limits for the Personal Scope of Employment Law' (2012) 3 *European Labour Law Journal* 35–54.

[42] Case C-456/02 *Trojani* [2004] ECR I-7573.

[43] See on the position of volunteers: C O'Brien, 'Drudges, Dupes and Do-Gooders. Competing Notions of "Value" in the Union's Approach to Volunteers' (2010) 1 *European Journal of Social Law* 49–75.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

Apart from that, the provisions of Directive 2004/38 show that there can be no resources requirement vis-à-vis citizens of other Member States who can prove that they are working as employed or self-employed persons within the meaning of this case law of the Court of Justice. The same applies to their family members.[44]

This case law implies that indigent migrant workers and self-employed persons, in the very broad sense of these terms, can claim social assistance and other minimum benefits in the host country where they are economically active, on an equal footing with the nationals of this host country. This is even the case when these workers only contribute to the economy of the host State to a limited extent. The social integration into the host society is seen by the Court of Justice as an instrument for promoting participation in the EU internal market and its economic goals of free movement of factors of production, even if their 'productivity' is rather low. The rationale behind this case law has more to do with the 'internal market' than with the 'combating of social exclusion', even if this actually contributes to the latter. Being economically active constitutes for the Court a sufficient link of integration, *inter alia,* because through the taxes the migrant worker pays he/she also contributes to the financing of the social policies of the host State.[45]

Yet, in other more recent case law the Court of Justice seems to depart from this mechanical application of the equal treatment provisions when it comes to claims by migrant workers for social benefits. In *Geven* the Court had to rule on the refusal by the competent German authorities of a child-raising allowance to a Dutch national who resided in the Netherlands and worked between 3 and 14 hours a week in Germany. In its judgment the Court accepted as appropriate the justification that the measure was intended to encourage the birth rate in Germany and that it should be limited to migrant workers having a sufficient link with Germany. For the Court of Justice, the fact that a non-resident worker does not have a sufficiently substantial occupation in the Member State concerned constitutes a legitimate justification for refusing to grant the social advantage at issue.[46]

In *Giersch*, on the claim for study grants for children of a frontier migrant worker, working in Luxembourg but residing in France, the Court of Justice argues that a frontier worker is not always integrated in the Member State of employment in the same way as a worker who is resident in that State. The Court of Justice stated that in order to avoid the risk of 'study grant forum shopping' and to ensure that the tax-paying frontier worker who also pays social security contributions in Luxembourg has a sufficient link with Luxembourg society, the financial aid could be made

---

[44] See Article 7(1)(a) and Article 14(4)(a) Directive 2004/38.

[45] Case C-542/09 *Commission v Netherlands* nyr [65]–[66] and Case C-379/11 *Caves Krier* nyr [53].

[46] Case C-213/05 *Geven* [2007] ECR I-6347 [26]. For a critical comment: S O'Leary, 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship' [2008] *Yearbook of European Law* 167–193; P Ploscar, *The Principle of Solidarity in EU Internal Market Law* PhD (University of Antwerp 2014) 237–240 and 317–318.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

conditional on the frontier worker having worked in that Member State for a certain minimum period. The Court of Justice suggested a period of five years.[47]

Geven and *Giersch* constitute a very worrying departure from previous case law, since the Court of Justice seems to indicate that migrant workers can no longer in all circumstances claim equal treatment in the State where they work and first have to demonstrate sufficient integration into the society of the host Member State before they can claim a benefit. This would amount to the introduction of a 'genuine link' requirement, which the Court of Justice has so far only applied for economically inactive migrants.[48] Some have submitted that the Court has not respected the boundaries between its case law on workers and case law on citizenship.[49] Others have called this 'cross-pollination' between the free movement of citizens and workers.[50] It remains to be seen whether the Court of Justice will continue on this line in its future case law.

IV.ii The Right to Minimum Subsistence Benefits in the Host State for Migrants Having a Link with the Status of 'Worker'

IV.ii.a First time jobseekers

In a number of cases the Court of Justice also brought jobseekers within the scope of these EU provisions on the right of free movement for workers. As a result, persons looking for a job in another Member State than their own for the first time were able to claim the financial support that a Member State granted its own jobseekers. In *Collins* the Court held the view that nationals of a Member State seeking employment in another Member State fall within the scope of Article 39 EC (now Article 45 TFEU) on the right to free movement for workers and jobseekers and, therefore, have the right to equal treatment.[51] This right also applies to financial benefits intended to facilitate access to employment on the labour market of a Member State. The Court of Justice confirmed this approach in its subsequent case law.[52] It referred in this context to the

---

[47] Case C-20/12 *Giersch* nyr [65], [80]. For the period of five years the Court of Justice refers to Article 24(2) of Directive 2004/38, which provides that, by derogation from Article 24(1) – according to which all Union citizens residing on the basis of that directive in the territory of the host Member State are to enjoy equal treatment with the nationals of that Member State – the host Member State is not to be obliged to grant maintenance aid for studies before the acquisition of a right of permanent residence which, under Article 16(1) of Directive 2004/38, is subject to a condition of residence of five years in the territory of the Member State concerned. This reference is very surprising and even misleading, since derogation from the equal treatment in this provision explicitly does not apply to workers and members of their family.

[48] See more on this case law in Section IV.iv.a.

[49] E Guild, S Peers and J Tomkin. *The EU Citizenship Directive* (Oxford University Press 2014) 227.

[50] Ploscar, *supra* note 46, 237–240.

[51] *Collins, supra* note 6 [56].

[52] Case C-258/04 *Ioannidis* [2005] ECR I-8275; *Vatsouras and Koupatanze*, *supra* note 39 [36]–[37] and *Prete*, *supra* note 6 [25].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

adoption in Article 17 EC (now Article 20 TFEU) of EU citizenship.[53] However, the Court considered it legitimate for a Member State to grant such an allowance only after a real link between the jobseeker and the labour market of that State has been ascertained.[54] The existence of such a link can be more specifically determined by establishing that the person concerned has, for a reasonable period, genuinely sought work in the Member State in question.[55]

According to this case law an economically inactive person, such as a jobseeker coming to a Member State with the intention of looking for a job, may invoke provisions initially aimed at workers with regard to the prohibition of discrimination on grounds of nationality on the part of the Member State where this person seeks employment. This right to equal treatment can also refer to a social minimum benefit as in *Collins*, which concerned the means-tested jobseeker's allowance in the UK or in *Vatsouras and Koupatantze*, which concerned a dispute with regard to a German basic benefit in favour of jobseekers.

IV.ii.b Former migrant workers

In some circumstances certain categories of economically inactive persons can invoke the EU provisions with regard to the free movement of workers and the principle of equal treatment included therein. Indeed, the European legislator confirmed in Article 7(3) Directive 2004/38 that in certain circumstances an EU citizen can maintain his/her status as an employee or self-employed person, i.e. if he/she is temporarily unable to work as a result of illness or accident, is in duly recorded involuntary unemployment or embarks on vocational training.[56] In these circumstances the person concerned not only retains the right to reside in the host State, but, on the basis of Article 24(1) of this directive, he/she can also claim the same treatment as the nationals of this host country with regard to all kinds of social benefits, including study finance grants for those on vocational training. In 2009 the Court of Justice expressly confirmed this in *Vatsouras and Koupatantze* concerning a dispute about a German basic benefit in favour of jobseekers.[57] Normally these persons will be entitled to a number of social security benefits such as unemployment benefits or compensation for incapacity for work. Moreover, the Court of Justice recently confirmed that the list in Article 7(3) of Directive 2004/38 of circumstances in which a migrant worker who is no longer in an employment relationship may nevertheless continue to benefit from that status, is not exhaustive. In *Saint-Prix* the Court stated that a woman who gives up work, or seeking work, because of the physical constraints of the late stages of pregnancy and the aftermath of childbirth retains the status of 'worker', within the meaning of Article 45

---

[53] *Collins*, *supra* note 6 [63]; *Ioannidis, supra* note 52 [22] and *Vatsouras and Koupatantze*, *supra* note 39 [37].

[54] *D'Hoop*, *supra* note 13 [38]; *Ioannidis*, *supra* note 52 [30] and *Prete*, *supra* note 6 [33].

[55] *Collins*, *supra* note 6 [70]; *Vatsouras and Koupatantze*, *supra* note 39 [38–39] and *Prete*, *supra* note 6 [46].

[56] Unless the person involved is involuntarily unemployed, the retention of the status of worker shall require the training to be related to the previous employment. This provision was inspired by the case law of the Court of Justice: see for instance Case 39/86 *Lair* [1988] ECR 3161 and *Ninni-Orache*, *supra* note 33.

[57] *Vatsouras and Koupatantze*, *supra* note 39 [31–32].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

TFEU, provided she returns to work or finds a job within a reasonable period after the birth of the child.[58]

So being economically active does not appear to be an absolute prerequisite for entitlement to equal treatment with workers in the host State. Persons finding themselves in an intermediate situation, because they are (temporarily) unemployed or have started vocational training remain covered by the provisions applicable to migrant workers. Hence, the legal position of these economically inactive persons continues to be governed by the EU internal market law on the free movement of workers.

However, these provisions and this case law leave a number of blind spots and gaps. Indeed, not all migrant workers who temporarily interrupt their economic activity will be allowed to maintain their status as workers, and consequently automatic entitlement to equal treatment. This may, for instance, be the case with interruptions because of illness or temporary care for others, including children.[59]

IV.ii.c The members of the family of migrant workers or former migrant workers

Furthermore, the right to access to social minimum benefits also applies to the worker's or ex-worker's economically inactive family members, even when they are no longer living together with this worker in the host State. This was illustrated by the judgments of the Court of Justice in *Ibrahim* and *Teixeira* of 23 February 2010.[60] These cases concerned single mothers who were economically inactive and had applied for housing assistance in the UK. This was denied to them with the argument that their right of residence and that of their children was not based on EU law. To demonstrate that it did rest on EU law, both mothers invoked Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011). This provision grants the children of EU migrant workers the right to access to general education, apprenticeship and vocational training. In these judgments the Court of Justice confirmed its earlier case law that, pursuant to Article 12 of Regulation 1612/68, the children of an EU citizen who have settled in a Member State during the exercise by their parent of rights of residence as a migrant worker in that Member State are entitled to reside there in order to attend general educational courses.[61] The fact that the parents of the children concerned have meanwhile divorced and the fact that the parent who exercised rights of residence as a migrant worker is no longer economically active in the host Member State are irrelevant in this regard. It is sufficient that the child settled in the Member State concerned at the time that one of the parents resided there as a migrant worker.[62] The Court also ruled that, as a consequence of the children's right to reside, the parents who are their carers must be

---

[58] Case C-507/12 *Saint-Prix* nyr.

[59] O'Brien, *supra* note 41; C O'Brien, 'I Trade, Therefore I am: Legal Personhood in the European Union' (2013) 50 *CML Rev* 1643–1684.

[60] Case C-310/08 *Ibrahim* [2010] ECR I-1065 and Case C-480/08 *Teixeira* [2010] I-1107.

[61] For a recent confirmation of this case law, see Case C-529/11 *Alarape and Tijani* nyr [26]–[27].

[62] *Teixeira*, *supra* note 60 [72] and [74].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

allowed to remain in the host Member State during the period of their children's education.[63]

This means that these economically inactive family members of a person who at one time worked as a migrant worker in the host country can continue to invoke the status of family members of a worker within the meaning of Regulation 1612/68 (now Regulation 492/2011) with a view to maintaining an autonomous right of residence while the children pursue an education. This right of residence will not be subject to the conditions for the right of residence in Directive 2004/38 for economically inactive migrants.[64] As a result of their EU status as family members of a worker they will also be able to claim the social benefits the host Member State grants its own nationals (such as housing assistance in *Ibrahim* and *Teixeira*).[65]

From this case law it can be inferred that in quite a lot of circumstances migrant persons within the EU, even when they are inactive, can claim rights linked to the status of worker in the host Member State, including access to social assistance or other social minimum benefits. This also applies to certain family members of such a worker, even when this worker only used to be economically active in this Member State or has meanwhile returned to his Member State of origin. In these cases the link with the exercise of one of the economic freedoms of the internal market becomes rather distant. So perhaps the Court's first objective in these judgments is the combating of social exclusion even if it does not mention this objective specifically.

IV.iii Entitlement to Social Minimum Benefits under the European System of Coordination of Social Security Schemes of Regulation 883/2004

The European system of coordination of social security schemes in Regulation 883/2004 (as well as in its predecessor Regulation 1408/71[66]) is designed to remove obstacles to the free movement of persons resulting from the diversity of the social security systems of the Member States. The system put in place is only a system of co-ordination. It does not seek to harmonise the Member States' social security systems or to bring them closer together. The only objective is to coordinate them in such a way that possible negative effects of the differences between those systems for migrant

---

[63] *Ibrahim*, *supra* note 60 [50], and *Teixeira*, *supra* note 60 [61]. See earlier *Baumbast*, *supra* note 7 [63], [71].

[64] See further under Section IV.iv.a.

[65] However, the recent judgment of the Court of Justice in Case C-333/13 *Dano, supra* note 12, could raise some doubts on this conclusion. Indeed, in this judgment the Court submitted the right to equal treatment as regards social benefits for economically inactive Union citizens to the right to reside pursuant to the provisions of Directive 2004/38 alone. This could be interpreted in the sense that Union citizens whose right to reside in the host Member State is not based on Directive 2004/38, but on another EU instrument, such as Article 12 of Regulation 1612/68 (now Article 10 of Regulation 492/2011) as in the *Ibrahim*, *Teixeira* and *Alarape* cases, would not be entitled to claim, on the basis of EU law, equal treatment for social benefits in the host State. See further on this judgment under Section IV.iv.b.

[66] Regulation (EEC) 1408/71 of the Council of 14 June 1971 concerning the application of the social security schemes to employees and self-employed persons, as well as to their family members travelling within the Community (hereinafter referred to as Regulation 1408/71).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

persons are removed.[67] Economically inactive persons are also covered by this EU coordination system since in the definition of its personal scope this regulation refers to all nationals of a Member State who are or have been subject to the legislation of one or more Member States (Article 2), without referring any longer to the status of employed or self-employed persons (as was the case in Article 2 of Regulation 1408/71).

In the first place, this coordination regime determines the Member State whose social security legislation is applicable in a cross-border situation (Title II of Regulation 883/2004). The starting points of these rules on the determination of the applicable legislation are the State of employment principle for economically active persons and the State of residence principle for economically inactive persons. Another underlying principle of this coordination is that of prohibition of discrimination on grounds of nationality for all benefits covered by the Regulation (Article 4 Regulation 883/2004). In addition, the coordination also contains rules with regard to the waiving of residence clauses in the allocation or preservation of social security benefits (Article 7 Regulation 883/2004). It also establishes a number of rules with regard to the aggregation of periods of insurance, employment and residence. The purpose of aggregation is to avoid a situation in which dividing a person's insurance career between different Member States would lead to a reduction in or loss of rights.[68]

As a result, in quite a number of cases this EU social security coordination system guarantees that persons migrating within the EU can keep their social security allowances (export of benefits) or have access to benefits in the new host country through the mechanism of aggregation of periods or the right to equal treatment. Therefore this coordination is an important instrument in preventing poverty as a result of exercising this right to free movement.

Regulation 883/2004 applies to all branches of social security.[69] Yet, social assistance is excluded from the scope of this coordination,[70] although the Court of Justice has always interpreted this exclusion quite narrowly. Indeed, confronted with claims regarding the export of a number of minimum subsistence benefits, the Court of Justice had to rule on the question whether they fall under the notion of social assistance of Article 4(4) of Regulation 1408/71 (now Article 3(5) of Regulation 883/2004) and are therefore excluded from export on the basis of this regulation. These benefits were called 'special non-contributory benefits of a mixed kind' since they were half-way between traditional social security and social assistance. Typical of these benefits is that

---

[67] See *inter alia* Case 41/84 *Pinna* [1986] ECR 1 [20] and more recently Case C-103/06 *Derouin* [2008] ECR I-1853 [20], [23]; Case C-228/07 *Petersen* [2008] ECR I-6989 [41] and Case C-208/07 *von Chamier-Glisczinski* [2009] ECR I-6095 [84].

[68] For more details on this coordination system see, among others, M Fuchs (ed), *Europäisches Sozialrecht* (Nomos 2013); M Morsa, *Sécurité sociale, libre circulation et citoyenneté européennes* (Anthemis 2012); F Pennings, *European Social Security Law* (Intersentia 2015).

[69] Article 3 refers to the following branches of social security: sickness benefits; maternity and equivalent paternity benefits; invalidity benefits; old-age benefits; survivors' benefits; benefits in respect of accidents at work and occupational diseases; death grants; unemployment benefits; pre-retirement benefits and family benefits.

[70] Article 3(5) of Regulation 883/2004.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

they are partly connected to social security, in that they benefit as of right persons who fulfil the conditions for the grant of the social security benefits to which they are linked, and partly to social assistance, in the sense that they are not dependent on periods of work or contributions and are intended to relieve a clear need.[71] Examples of such benefits are supplements to pensions and special benefits for disabled or invalid persons. In its case law of the 1970s and 1980s, the Court of Justice developed a broad definition of social security within the meaning of Regulation 1408/71. This also included these special non-contributory benefits to which the Court of Justice applied the export provision.[72]

In response to this case law, the EU legislature intervened in 1992 by creating a special coordination system for these benefits.[73] For the benefits listed in the newly created Annex IIa of Regulation 1408/71, Member States could apply a residence condition preventing the export of these benefits. As a consequence a beneficiary of such a benefit would, on the one hand, lose it when transferring his/her residence to another Member State and would, on the other, be entitled in his/her new Member State of residence to benefits of that state listed in Annex IIa. Even prior submission to the host Member State's social security legislation was not required any more.[74] This entitlement in the Member State of residence is seen as a compensation for the non-exportability of these benefits.[75] The justification for limiting the export of these benefits was mainly that they were not based on the payment of contributions by the beneficiary and were meant to guarantee a level of subsistence taking account of the cost of living and integration in a particular Member State. This purpose would be lost if it were to be granted outside the State of residence.[76]

In response to these legislative developments the Court has held that it is permissible for the Union legislature to adopt provisions derogating from the principle of the exportability of social security benefits. In particular, the grant of benefits closely linked to the social environment may be made subject to a condition of residence in the State of the competent institution.[77] Yet the Court examined whether or not the benefits

---

[71] See Case 160/02 *Skalka* [2004] ECR I-5613 [22].

[72] See, for instance, Case 1/72 *Frilli* [1972] ECR 457; Case 187/73 *Callemeyn* [1974] ECR 553; Case 63/76 *Inzirillo* [1976] ECR 2057; Case 139/82 *Piscitello* [1983] ECR 1427; Joined Cases 379-381/85 and 93/86 *Giletti and others* [1987] ECR 955; Case C-356/89 *Newton* [1991] ECR 3017.

[73] By Regulation (EEC) 1247/92 of the Council of 30 April 1992 [1992] OJ L 192/1, which amended Regulation 1408/71.

[74] Case C-20/96 *Snares* [1997] ECR I-6057 [48].

[75] R Cornelissen, 'EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy', in E Guild, S Carrera and K Eisele (eds), *Social Benefits and Migration. A Contested Relationship and Policy Challenge in the EU* (Centre for European Policy Studies (CEPS) 2013) 91; F Van Overmeiren, E Eichenhofer and H Verschueren, 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E Guild, C Gortazar Rotaeche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2014) 257.

[76] See *Skalka*, *supra* note 71 [24].

[77] *Snares*, *supra* note 74 [42]; Case C-154/05 *Kersbergen-Lap and Dams-Schipper* [2006] ECR I-6249 [33] and Case C-537/09 *Bartlett* [2011] ECR I-3417 [38]. Only in the case of an economically active Union citizen did the Court of Justice oblige the involved Member State of

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

involved had been included rightfully in the list of non-exportable benefits and responded to the criteria of being 'special' and of a 'mixed kind'.[78]

In its Article 70, Regulation 883/2004 took over this special coordination regime for the benefits listed in its Annex X. Article 70(4) of Regulation 883/2004 indeed confirms that the special non-contributory cash benefits listed in Annex X shall be provided exclusively in the Member State in which the persons concerned reside at the expense of this Member State's institutions. The only requirement for entitlement to these benefits is the person's place of residence, defined in Article 1(j) of Regulation 883/2004 as the place where a person habitually resides.

However, the Court of Justice recently decided in its judgments in *Brey* and in *Dano* that these 'special non-contributory cash benefits' must also be qualified as 'social assistance' within the meaning of the provisions of Directive 2004/38.[79] This qualification has important consequences for the entitlement of migrant persons to these benefits in the host State. Indeed, Article 14(1) of Directive 2004/38 provides that Union citizens have the right to three months' residence in the host Member State, as long as they do not become an unreasonable burden on the social assistance system of the host Member State. Moreover, the right of residence for more than three months and the retention of this right for economically inactive persons is conditional upon the citizens having sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State (Article 7(1)(b)) and Article 14(2) Directive 2004/38). In *Dano* the Court said that economically inactive Union citizens can only claim equal treatment for social benefits with nationals of the host State, as guaranteed by the TFEU as well as by Regulation 883/2004 and Directive 2004/38, if their residence on the territory of that State complies with the conditions of Directive 2004/38, more specifically being self-sufficient.[80] Clearly, the Court of Justice's judgments in *Brey* and *Dano* makes it more difficult for economically inactive EU migrants to rely in the future on the social minimum benefits listed in Annex X to Regulation 883/2004.[81] This result doubtless jeopardises the right to free movement of indigent persons.

---

employment to export a 'special non-contributory cash benefit' to the Member State of residence of the migrant worker concerned, despite its listing in Annex IIa of Regulation 1408/71: Case C-287/05 *Hendrix* [2007] ECR I-6909.

[78] In a number of cases the Court invalidated the listing of the disputed benefits: Case C-43/99 *Leclere* [2001] ECR I-4265; Case C-215/99 *Jauch* [2001] ECR I-1901, paras 20–21, and Case C-299/05 *Commission v European Parliament and Council* ECR [2007] ECR I-8695. In others it validated the listing of the disputed benefit: *Skalka*, *supra* note 71; *Kersbergen-Lap*, *supra* note 77 and Case C-265/05 *Perez Naranjo* [2007] ECR I-347. See in more detail on this discussion: Cornelissen, *supra* note 75, 82–110; AP Van der Mei, 'Regulation 1408/71 and Co-ordination of Social Non-contributory Benefit Schemes' (2002) 27 *EL Rev* 551–566; H Verschueren, 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the Court of Justice' (2009) 11 *European Journal of Social Security* 217–234.

[79] *Brey, supra* note 11 [61] and *Dano, supra* note 12 [63].

[80] *Dano, supra* note 12 [69], [73].

[81] See on these judgments further under Section IV.iv.b.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

IV.iv The Right to Free Movement for Economically Inactive Persons and Equal Treatment in the Host State for Minimum Subsistence Benefits

IV.iv.a European citizenship case law and Directive 2004/38

The above analysis shows that a large number of persons migrating within the EU can invoke the prohibition of discrimination on grounds of nationality to exercise rights regarding social minimum benefits in the host country because of their status as workers or self-employed persons or a status linked to this capacity. However, if migrant Union citizens do not belong to the category of economically active or post-active persons, their recourse to social assistance in the host State is much more controversial, both legally and politically.

The starting point of the discussion is the statement by the Court of Justice that non-economic migration between Member States also triggers the application of the Treaty prohibition of discrimination on grounds of nationality in the host State (now Article 18 TFEU).[82] In its case law prior to the coming into force of Directive 2004/38 the Court of Justice confirmed that this principle also applies to social assistance benefits,[83] as well as to other non-contributory benefits, such as student maintenance grants.[84] Nevertheless, the Court of Justice accepted in these rulings possible justifications for derogations from equal treatment for social minimum benefits, provided that the proportionality test is met.

This case law was much debated.[85] According to critical commentators the Court has been interpreting EU law against its wording and purpose while using the proportionality principle to establish rights which do not yet exist.[86] Other scholars have pointed at the Member States' right to protect themselves against EU interference with the way they define the boundaries of their basic welfare systems or they have considered this case law as counterproductive since it risks promoting abuse and social benefit tourism.[87] A strict definition of the subjective and individual rights of EU migrants could interfere with the Member States' political choices of commutative justice[88] or

---

[82] See for the first time Case C-85/96 *Martinez Sala* [1998] ECR I-2691.

[83] *Grzelczyk, supra* note 13, and *Trojani, supra* note 42.

[84] Case C-209/03 *Bidar* [2005] ECR I-2119.

[85] For a comprehensive account of the literature see, among others, F Wollenschläger, 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration' (2011) 17 *EL Journal* 1–34.

[86] O Golynker, 'Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity' (2005) 30 *EL Rev* 120; K Hailbronner, 'Union Citizenship and Access to Social Benefits' (2005) 42 *CML Rev* 1245–1267.

[87] P Larkin, 'The Limits to European Social Citizenship in the United Kingdom' [2005] 68 *ML Rev* 440–442.

[88] A José Menéndez, 'European Citizenship after *Martinez Sala* and *Baumbast*: Has European Law Become More Human but Less Social?', in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 391–392.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

the solidarity basis of the national welfare systems,[89] and may come into conflict with the collective foundation of the solidarity systems operating within the nation State.[90]

Others, including myself,[91] were more positive towards this case law. The Court of Justice is actually taking a traditional 'functional approach' in its interpretation of the Treaty provision on free movement of persons. Indeed, in this case law Union citizenship appears to be an instrument to increase mobility within the EU.[92] However, the Court did not grant economically inactive migrants unconditional access to the welfare benefits of the host State. Depending on the case, the applicant should 'not become an unreasonable burden on the public finances',[93] should 'have a genuine link with the employment market of the State concerned',[94] or 'need[s] to demonstrate a certain degree of integration into the society of the host State'.[95] Requiring a genuine link with the host Member State could, for the Court, reflect a legitimate objective, capable of justifying restrictions on the right to move and reside freely in the territory of the Member States.[96] The Court makes it clear that Articles 21 and 18 TFEU should not be regarded as a 'letter of safe conduct' for benefit tourism.[97] It would seem that the requirement of a genuine link with the host Member State is designed to accommodate

---

[89] M Dougan, 'The Constitutional Dimension to the Case Law on Union Citizenship' (2006) 31 *EL Rev* 623. See also NNS, 'Editorial. Three Paradoxes of EU Citizenship' (2010) 35 *EL Rev* 129–130.

[90] A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 *EL Rev* 787–818.

[91] H Verschueren, 'European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems' (2007) 9 *European Journal of Migration and Law* 307–346.

[92] K Lenaerts and T Heremans, 'Contours of a European Social Union in the Case-Law of the European Court of Justice' (2006) 2 *European Constitutional Law Review* 103; E Spaventa, 'The Constitutional Impact of Union Citizenship', in U Neergaard, R Nielsen and L Roseberry (eds), *The Role of Courts in Developing a European Social Model. Theoretical and Methodological Perspectives* (DJOF Publishing 2010) 165; Ch Timmermans, '*Martinez Sala* and *Baumbast* revisited', in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 348–349; AP Van der Mei, 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State' (2005) 7 *EJML* 207–209.

[93] *Grzelzyck*, *supra* note 13 [44] and Case C-75/11 *Commission v Austria* nyr [60].

[94] *Collins*, *supra* note 6 [67]–[69] and *Vatsouras and Koupatantze*, *supra* note 39 [38]–[39].

[95] *Bidar*, *supra* note 84 [57]. See also *Ioannidis*, *supra* note 52 [30] et seq; Case C-158/07 *Förster* [2008] ECR I-8507 [54] and Case C-103/08 *Gottwald* [2009] ECR I-9117 [32] et seq.

[96] D Thym, 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits', in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2012) 162. The genuine link required between the person claiming a benefit and the host Member State should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes. See, to that effect, *Vatsouras and Koupatantze*, *supra* note 39 [41]–[42]; *Gottwald*, *supra* note 95, para 95 and *Commission v Austria*, *supra* note 93 [63].

[97] Lenaerts and Heremans, *supra* note 92, 195.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

the concerns of the Member States,[98] as well as an attempt to strike a fair balance between the rights of economically inactive migrants and the Member States' legitimate wish to protect their national welfare systems.[99]

This approach is reflected by the EU legislation in Directive 2004/38. This directive does provide in its Article 24(2) for a derogation on the principle of equal treatment for social assistance during the first three months of residence of economically inactive persons and, for students, even during the first five years as regards maintenance aid for studies.[100] In addition, Article 14(1) provides that Union citizens have the right to three months' residence in the host Member State, as long as they do not become an unreasonable burden on the social assistance system of the host Member State. Moreover, the right of residence for more than three months and the retention of this right for economically inactive persons is conditional upon the citizens having sufficient resources for themselves and their family members so as not to become a burden on the social assistance system of the host Member State (Article 7(1)(b) and Article 14(2) Directive 2004/38). Article 8(4) specifies that Member States may not lay down a fixed amount of 'sufficient resources', but must take into account the personal situation of the person concerned. Furthermore, the Court of Justice confirmed that the origin of a person's resources is not relevant to assess the fulfilment of the resources requirement.[101] The Court of Justice even considered it contrary to EU law for a Member State to require inactive and retired EU nationals to prove that they have sustainable resources in order for them to obtain a residence permit.[102] Moreover, Article 14(3) provides that an expulsion measure shall not be the automatic consequence of a Union citizen's recourse to the social assistance system of the host Member State.[103] After five years of legal residence in the host State, a migrant EU citizen is granted the right to permanent residence (Article 16), which is no longer subject to any

---

[98] S Giubboni, 'Free Movement of Persons and European Solidarity' (2007) 13 *EL Journal* 371–372.

[99] *Baumbast*, *supra* note 7 [90]; *Zhu and Chen*, *supra* note 10 [32] and Case C-408/03 *Commission v Belgium* [2006] ECR I-2647 [37], [41]. In the same vein S Currie, 'The Transformation of Union Citizenship', in M Dougan and S Currie (eds), *50 Years of the European Treaties* (Hart Publishing 2009) 374–376; Guild, Peers and Tomkin, *supra* note 49, 225–228; D Kostakopoulou, 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in A Micklitz and B De Witte (eds), *The European Court of Justice and the Autonomy of the Member States* (Intersentia 2012) 182–183; K Lenaerts, 'European Union Citizenship, National Welfare Systems and Social Solidarity' (2011) 18 *Jurisprudence* 398–400; Spaventa, *supra* note 92, 146 and P Minderhoud, 'Directive 2004/38 and Access to Social Assistance', in E Guild, C Gortazar Rotaeche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2011) 210–212 and 223–224.

[100] Which the Court of Justice approved in *Förster*, *supra* note 95.

[101] *Zhu and Chen*, *supra* note 10 [30]–[31]. See also *Commission v Belgium, supra* note 10 [40].

[102] Case C-398/06 *Commission v Netherlands* [2008] ECR I-56 (summary publication).

[103] In *Ziolkowski and Szeja* the Court confirmed that those conditions are intended, inter alia, to prevent such persons from becoming an unreasonable burden on the social assistance system of the host Member State: *Ziolkowski and Szeja, supra* note 8 [40].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

subsistence requirement. It offers the citizen in question a full right to equal treatment with the nationals of that State, including in the matter of social assistance.[104]

IV.iv.b Recent case law of the Court of Justice on so-called 'benefit tourism'

After the entry into force of Directive 2004/38 discussions continued on what exactly could be considered as an 'unreasonable burden', which benefits should be regarded as social assistance and whether the Member State of residence could subject access to social benefits to compliance with the necessary requirements for obtaining a legal right of residence in the host Member State.

Indeed, the unclear character of the conditions used by the Court of Justice to decide who is and who is not entitled to non-contributory minimal benefits in the host State has been very much disputed and criticised. In *Trojani* it seemed sufficient to 'be lawfully resident in the host Member State for a certain time *or* to possess a residence permit'.[105] In *Grzelzcyk* the criteria used were that 'the beneficiaries of the right of residence must not become an unreasonable burden on the public finances' and that 'the financial difficulties of the student are temporary'.[106] In *D'Hoop* and *Collins* the Court referred to the need to 'establish that a genuine link exists between the person seeking work and the employment market of that State'.[107] In *Bidar* it seemed to be decisive that students could 'demonstrate a certain degree of integration into the society of the host State, which could be regarded as established after having been resident for a certain length of time'.[108] Moreover, the 'genuine link' required need not be fixed in a uniform manner for all benefits, but should be established according to the constitutive elements of the benefit in question.[109] Even criteria such as 'legal residence' and 'habitual residence' are subject to interpretation and discussion.[110] It

---

[104] For a more detailed analysis and comments on these provisions of Directive 2004/38, see Guild, Peers and Tomkin, *supra* note 49, 123–131, 141–147 and 170–174.

[105] *Trojani*, *supra* note 42 [43].

[106] *Grzelzcyk*, *supra* note 13 [44].

[107] *D'Hoop*, *supra* note 13 [38]; *Collins, supra* note 6 [67]–[69] and *Vatsouras and Koupatantze*, *supra* note 39 [38].

[108] *Bidar*, *supra* note 84 [57] and *Gottwald*, *supra* note 95 [35]. Only in *Förster*, *supra* note 95, did the Court of Justice seem to have departed from a case-by-case approach for the implementation of Article 24(2) Directive 2004/38 by referring to the precise limitation of the rights to maintenance support for students in that provision. See also M Dougan, 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens', in M Adams, H de Waele, J Meeusen and G Straetmans (eds), *Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice* (Hart Publishing 2013) 132–133.

[109] *Commission v Austria*, *supra* note 93 [63].

[110] See for instance Case C-90/97 *Swaddling* [1999] ECR I-1075. See also on the unclear character of the conditions used by the Court of Justice, S Besson and A Utzinger, 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box' (2007) 13 *EL Journal* 573; M Dougan and E Spaventa, '"Wish You Weren't Here …". New Models of Social Solidarity in the European Union', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 204–205; S O'Leary, 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union', in G De Búrca (ed), *EU Law and the Welfare State. In Search of Solidarity* (Oxford University Press 2005) 73–75; F Pennings, 'EU Citizenship: Access to Social Benefits in Other EU Member States' (2012) 28 *International*

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

would leave the public authorities of the Member States with too much room for discretion and for different interpretations or could even lead to inconsistency in the uniform application of EU law by national courts.[111] For some it will be difficult to argue that a single person becomes a burden on the finances of the host State even though its reasonableness may be called into question.[112] Legal uncertainty, confusion and incoherence seem to be the consequence.[113] It was also questioned whether the host Member State could subject access to social benefits to compliance with the necessary requirements for obtaining a legal right of residence on the basis of this directive. Moreover, the meaning of the principle of prohibition of discrimination on grounds of nationality and the possible exceptions remained unclear in these issues.

In its most recent case law the Court of Justice tried to find an answer to these questions. First, the Court defined the concept of 'social assistance' in Directive 2004/38 as referring

> to all assistance schemes established by the public authorities, whether at national, regional or local level, to which recourse may be had by an individual who does not have resources sufficient to meet his own basic needs and the needs of his family and who by reason of that fact may, during his period of residence, become a burden on the public finances of the host Member State which could have consequences for the overall level of assistance which may be granted by that State.[114]

This concept of social assistance also includes the 'special non-contributory cash benefits' listed in Annex X to Regulation 883/2004.[115]

In *Brey* the Court said that the national authorities cannot conclude that the person has become an unreasonable burden without first carrying out an overall assessment of the specific burden which granting that benefit would place on the national social assistance system as a whole, by reference to the personal circumstances characterising the individual situation of the person concerned. The Court indicated that the national authorities may take into account, *inter alia*, the amount and the regularity of the income which the migrant economically inactive person receives, the fact that those

---

Journal of Comparative Labour Law 333; J Shaw, 'A View of the Citizenship Classics: *Martinez Sala* and Subsequent Cases on Citizenship of the Union', in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 362; Thym, *supra* note 96, 163–164; AP Van der Mei, 'Regulation 1408/71 and Co-ordination of Social Non-contributory Benefit Schemes' (2002) 27 *EL Rev* 563–566.

[111] For an account of the transposition of Directive 2004/38 in this respect by some Member States: Minderhoud, *supra* note 99, 212–225; Van Overmeiren, Eichenhofer and Verschueren, *supra* note 75, 241–243.

[112] C Closa Montero, '*Martinez Sala* and *Baumbast*: An Institutionalist Analysis', in M Poiares Maduro and L Azoulai (eds), *The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty* (Hart Publishing 2010) 400; N Nic Shuibhne and M Maci, 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law' (2013) 50 *CML Rev* 1002.

[113] Dougan, *supra* note 108, 140 et seq; Hailbronner, *supra* note 86, 1264; Thym, *supra* note 96, 162–164.

[114] *Brey*, *supra* note 11 [61] and *Dano*, *supra* note 12 [63].

[115] *Dano*, *supra* note 12 [63].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

factors have led those authorities to issue him/her with a certificate of residence and the period during which the benefit applied for is likely to be granted to him/her. In addition, in order to ascertain more precisely the extent of the burden which that grant would place on the national social assistance system, the Court considers that it may be relevant, agreeing on that point with the Commission, 'to determine the proportion of the beneficiaries of that benefit who are Union citizens in receipt of a retirement pension in another Member State'.[116]

It seems that with this judgment the Court of Justice had increased rather than alleviated the legal uncertainty and confusion created by its previous case law referred to above, in particular when it comes to determining what is an 'unreasonable burden'.[117] Indeed, it remained very unclear on the basis of which elements and according to which procedure the national court should make such an assessment, so that *Brey* only created more confusion and legal uncertainty.

In its ruling of 11 November 2014 in *Dano* the Court made an attempt to clarify this. In essence the Court said that economically inactive Union citizens can only claim equal treatment for social benefits with nationals of the host State, as guaranteed by the TFEU as well as by Regulation 883/2004 and Directive 2004/38, if their residence on the territory of that State complies with the conditions of Directive 2004/38. In the period of residence of between three months and five years in the host State those conditions include the requirement that economically inactive Union citizens must have sufficient resources for themselves and their family members (Article 7(1)(b) Directive 2004/38). Therefore, Member States have the possibility of refusing to grant social benefits to Union citizens who exercise their right to free movement solely in order to obtain another Member State's social assistance benefits although, upon arriving in the territory of that State, they do not have sufficient resources to claim a right to reside. In order to determine whether these persons meet the latter condition, their financial situation should be examined in detail, without taking account of the social benefits claimed.

However, this judgment allows both a strict interpretation and a broad interpretation of the possibilities the host Member States would have to deny a Union citizen the right to equal treatment as regards social benefits. As far as a strict interpretation is concerned, one could deduce from paragraphs 78 and 66 of this judgment that the Court limits the scope of the derogation from the equal treatment principle to situations in which Union citizens' only motive for moving to another Member State is to obtain social assistance, meaning that it is clear from the very start of their residence that they have no intention of integrating into the host society, for instance by taking up or seeking employment. Such a derogation would be justified as it is intended to prevent 'benefit tourism' and an unreasonable burden on the host State's social assistance system. In such cases no further proportionality test or 'genuine link' test would be required. That would explain why in this judgment the Court does not refer at all to the

[116] *Brey, supra* note 11 [78].

[117] For a more detailed analysis of this judgment, including its relevance for the meaning of Regulation 883/2004 on the social security coordination see H Verschueren, 'Free Movement or Benefit Tourism: The Unreasonable Burden of *Brey*' (2014) 16 *European Journal of Migration and Law* 147–179.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

proportionality test as defined in Articles 8(4) and 14(3) and recital 16 of Directive 2004/38 and to which the Court referred in its previous case law, including *Brey*. In all other circumstances the limitations to the right to equal treatment should continue to be subject to such a test, in the context of which the Court also held that the genuine link required between the person claiming a benefit and the host Member State should be established according to the constitutive elements of the benefit in question, including its nature and purpose or purposes.[118]

This strict interpretation of the derogation from the equal treatment principle as outlined above would be in line with the legal context of the right to free movement as a fundamental right, requiring each derogation from this principle to be strictly defined and proportionate.[119] In this sense, the term 'benefit tourism' is limited to situations in which the motives or intentions of the migrant Union citizen are 'solely to obtain another Member State's social assistance'.[120] Consequently, other situations in which a migrating Union citizen claims social benefits in the host State, but did not move to this host State solely to obtain such benefits, should not be qualified as 'benefit tourism'.

Yet, the wording of this judgment would also allow a broader interpretation of the possibilities the host Member State would have to derogate from the prohibition of discrimination on grounds of nationality for the granting of social benefits to economically inactive Union citizens. First, in paragraph 69 (to which paragraph 81 explicitly refers once again) the Court says that 'a Union citizen can claim equal treatment with nationals of the host Member State *only* if his residence in the territory of the host Member State complies with the conditions of Directive 2004/38'. In paragraph 73 the Court of Justice states that for those whose period of residence in the host Member State has been longer than three months but shorter than five years, Article 7(1)(b) subjects the right to reside to 'the requirement that the economically inactive Union citizen must have sufficient resources for himself and his family members'. Accordingly, the Court adds in paragraph 82, national legislation may exclude nationals of other Member States who do not have a right of residence under Directive 2004/38 in the host Member State from entitlement to certain 'special non-contributory cash benefits'.

Moreover, the Court does not limit the exceptions to the equal treatment provisions to social assistance benefits alone. In paragraph 73 as well as in paragraphs 74, 77 and 78 the Court refers to the claim for 'social benefits' in general, without, however, defining this concept and despite the fact that elsewhere the Court qualified the German benefit at stake as a 'social assistance benefit' (paragraph 63). In paragraph 76 the Court even refers to the 'Member State's welfare system'[121] and says that 'Article 7(1)(b) of Directive 2004/38 seeks to prevent economically inactive Union citizens

[118] See, to that effect, *Vatsouras and Koupatantze, supra* note 39 [41]–[42]; *Gottwald*, *supra* note 95 [34]; *Commission v Austria*, *supra* note 93 [63].

[119] *Baumbast*, *supra* note 7 [91]; *Zhu and Chen*, *supra* note 10 [32]; *Commission v Belgium*, *supra* note 10 [39]; *Lassal, supra* note 8 [29–31]; *Commission v Austria*, *supra* note 93 [54] and *Brey*, *supra* note 11 [70].

[120] *Dano*, *supra* note 12 [78].

[121] The French version of the judgment, from which the translations in the other languages are made, uses the term 'le système de protection sociale' and the German translation speaks of 'das System der sozialen Sicherheit'.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

from using the host Member State's welfare system to fund their means of subsistence'. Yet, the 'welfare system', 'le système de protection sociale' or 'das System der sozialen Sicherheit' is far more than just the 'social assistance system' of the Member States to which Article 7(1)(c) refers. In addition, these paragraphs are worded very generally and no reference at all is made to a proportionality test and any reference to the initial motives of the migrating Union citizens is also lacking in these paragraphs as well as in the Court's *dictum*.

Therefore, the Court's analysis of the meaning of Directive 2004/38 could be interpreted to the effect that Member States are allowed to refuse to pay any social benefits, including social security benefits, to economically inactive Union citizens who do not have the right to reside under Directive 2004/38 because they do not possess sufficient resources of their own. There is a risk that, under the pressure of public opinion, popular press and Eurosceptics, some Member States will interpret and apply the possibilities offered by the wording of the judgment in *Dano* as broadly as possible.

However, it not clear what the consequences of this case law would be for the host Member States' ability to expel Union citizens who do not possess sufficient resources. Indeed, Article 14(3) Directive 2004/38 expressly provides that expulsion measures shall not be the automatic consequence of a Union citizen's recourse to the social assistance system of the host State. Is such a measure still subject to the unreasonableness test the Court adopted in *Brey*? And what if the expulsion is not allowed on the basis of such a criterion, but the citizen involved can be refused access to social benefits in the host State on the basis of the Court's reasoning in *Dano*? This kind of situation would manifestly result in the creation of poverty on the territory of the host State. Would this not be in contradiction to the objectives of the Union as enshrined in provisions such as Article 3(3) TEU, Articles 9 and 151(1) TFEU as well as Articles 1 and 34(3) of the EU Charter of Fundamental Rights?

It is submitted that such a broad interpretation would be contrary to the above-mentioned principles and objectives of the EU on the free movement of persons, including those who are or who become economically inactive. It remains to be seen whether the Court would indeed adopt such a broad interpretation in its future case law. Therefore it is necessary to await further case law of the Court in this matter so as to know exactly what the consequences will be. The Court will undoubtedly be confronted with new cases on these issues, the advantage of which is that it will have the opportunity to clarify its case law further.[122]

V. IS IT POSSIBLE TO DISAMBIGUATE?

The above analysis reveals the ambiguity between the EU objective of guaranteeing the right to free movement of persons and equal treatment on the one hand and the objective of fighting poverty and social exclusion on the other.

This is related to the concern, as expressed in e.g. Directive 2004/38 and recognised by the case law of the Court of Justice, to prevent economically inactive migrants from

[122] See in particular the pending cases C-67/14 *Alimanovic* and C-308/14 *Commission v United Kingdom*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

becoming a burden on the host Member State's social assistance system. It is based on the idea that the exercise of the right of residence can be subordinated to legitimate concerns of the Member States, such as the protection of their public finances.[123] As we have already pointed out in the introduction, this concern of the Member States as well as the danger of so-called 'benefit tourism' has been much publicised lately. The balance the Court of Justice has had to find is not just a balance between legal and political objectives at EU level but also between these objectives and the Member States' interests. The fact that since 2004 the Union has been expanding with a number of Member States whose standard of living is lower than that in the older Member States certainly has something to do with that.[124]

Nevertheless recent studies of the European Commission show that migration within the EU is only to a small extent inspired by this benefit tourism.[125] The findings of this study can be summarised as follows. Non-active EU migrants represent a very small share of the total population in each Member State. On average, EU migrants are more likely to be in employment than nationals living in the same country. Pensioners, students and jobseekers accounted for more than two-thirds of the non-active EU migrant population (71%) in 2012. The vast majority of non-active EU migrants (79%) live in economically active households and the majority of them have worked before in the current country of residence (64%). Evidence also shows that the vast majority of migrants move to find (or take up) employment and that this remains the key motive for intra-EU migration. Moreover, activity rates among such migrants have increased over the last seven years. The study found little evidence in the literature and stakeholder consultations to suggest that the main motivation of EU citizens to migrate and reside in another Member State is benefit related as opposed to work or family related. This is underpinned by data which show that in most countries, immigrants are not more intensive users of welfare than nationals.

Nevertheless, the legitimacy of the entitlement of indigent EU migrants to social minimum benefits in the host State is more disputed than ever. This clearly impacts on the way the Court of Justice handles this issue. The Court of Justice increasingly hesitates to automatically apply the right to equal treatment for workers with regard to social benefits, as demonstrated by *Geven* and *Giersch*. Moreover, in its citizenship case law, as recently illustrated by its judgments in *Brey* and *Dano*, the Court tries to reconcile the right to free movement, including for inactive persons, with the Member States' justified concerns to protect their social system from unwanted intruders, the result of which, however, is ambiguous and unsatisfactory.

---

[123] *Brey*, *supra* note 11 [54] and [72]. For more details on these judgments see also: D Thym, 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens' (2015) 52 *CML Rev* 17-50; and H Verschueren, 'Preventing "Benefit Tourism" in the EU: a Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano'* (2015) 52 *CML Rev* 363-390.

[124] E Guild, 'Does European Citizenship Blur the Borders of Solidarity?', in E Guild, C Gortazar Rotaeche and D Kostakopoulou (eds), *The Reconceptualization of European Union Citizenship* (Martinus Nijhoff 2014) 206.

[125] See *supra* note 2. Also the report of the Deutsche Bank suggests that the welfare magnet effect is relatively small and stresses that the internal EU migration has generally positive effects: D Bräuninger, *supra* note 2.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

Hence, the legal confusion which the Court of Justice seems to have only increased may call for more legally secure solutions to balance the fundamental right to free movement of Union citizens and the Member States' wish to be protected against undue reliance on their social systems.[126]

One of the ideas could be to extend the waiting period of three months in Article 24(2) Directive 2004/38 before a migrating economically inactive person is entitled to social assistance benefits in the host State. In the interim period such a person would continue to be entitled to the social assistance benefits of his/her home State, which would then be obliged to export these benefits.

Introducing a cost compensation mechanism between the former Member State of residence and the new State of residence for residence-based minimum subsistence benefits could also alleviate the burden of the latter. Such a system would entail the reimbursement by the first Member State of the benefits paid by the latter. It could be limited to a certain length of time (one year), after which the host State would take over the financial responsibility for the payment of social minimum benefits. Such a reimbursement system already exists in the context of the EU social security coordination system of Regulation 883/2004. For the cost of medical care, Article 35 of this regulation provides for a reimbursement system between the Member State of insurance and the Member State in which the medical treatment has been provided. In addition, Article 65(6)–(8) introduces a limited reimbursement system for the cost of the unemployment benefits provided by the Member State of residence for workers who, before their unemployment, worked as frontier workers in another Member State. These examples show how a cost compensation mechanism in the field of social security could operate at EU level. Even the creation of an EU fund for the purpose of cost compensation for social minimum benefits paid to indigent migrant persons was suggested, so that the cost of providing such minimum support would be shared and distributed among all the Member States.[127] This solution would prevent an indigent migrant person falling between two stools in this period. Such a person would at any time be entitled to social minimum benefits in some Member State. In order to guarantee legal certainty any possibility to deny such benefits by referring to the blurred unreasonableness test, would be put aside. But the political feasibility of such compensation schemes is questionable.

Others plead for the adoption of an EU instrument regarding the minimum income the Member States would have to provide to the persons living on their territory.[128] Such an instrument could take the form of an EU Framework Directive on the

---

[126] Some of the following suggestions are taken from Van Overmeiren, Eichenhofer and Verschueren, *supra* note 75, 258–262. For other suggestions see also AP Van der Mei, *Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits* (Hart Publishing 2003) 203–220; and D Bräuninger, *supra* note 2.

[127] G Vonk, *Homelessness and the Law: Challenges for the European Union. Paper presented at the 21st International Conference of Europeanists*, Washington DC, 14–16 March 2014, 15. See also Van der Mei, *supra* note 126, 210–211.

[128] See for instance M Ferrera and S Sacchi, 'A More Social EU? In What Areas? In What Forms' (2007) 1 *European Governance* 18.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

adequacy of minimum income schemes, which would include agreed common criteria.[129] The European Anti-Poverty Network (EAPN) has made a number of concrete proposals regarding such a Framework Directive on Minimum Income.[130] However, it remains uncertain whether the Treaties contain a legal basis for such an instrument, and it is even more uncertain whether there is the political will to adopt it.[131]

A comparable idea would be the adoption of an EU instrument introducing common standards for the protection of vulnerable people in need, including basic forms of support, shelter and aid for the destitute and homeless. Such standards should correspond to the basic human rights responsibilities of the Member States.[132] Interestingly enough, such an instrument already exists for a specific category of third-country nationals, namely asylum seekers. Indeed, Directive 2003/9 on minimum standards for the reception of third-country asylum seekers provides for the obligation of Member States to make provisions on material reception conditions in order to ensure a standard of living adequate for the health of applicants and capable of ensuring their subsistence. The directive specifies that the 'material reception conditions' shall mean the reception conditions that include housing, food and clothing, provided in kind or as financial allowances or in vouchers, and a daily expenses allowance.[133] Moreover, the Member States are required to adjust the reception conditions to the situation of persons having specific needs, such as minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or serious forms of violence (Articles 17–20). In a judgment of 27 February 2014 the Court of Justice confirmed that these provisions observe the fundamental right laid down in Article 1 of the Charter of Fundamental Rights of the European Union, under which human dignity must be respected and protected. For the Court of Justice, where a Member State has opted to provide the material reception conditions in the form of financial allowances, those allowances must be sufficient to ensure a dignified standard of living, adequate for the health of applicants and capable of ensuring their subsistence by enabling them to obtain housing, if necessary, on the private rental market.[134] Comparable obligations are also laid down in the recently adopted Directive 2013/33 which replaced Directive

---

[129] H Frazer and E Marlier, *Minimum Income Schemes Across EU Member States* (EU Network of National Independent Experts on Social Inclusion 2009) 13.

[130] A Van Lancker, *Working Document on a Framework Directive on Minimum Income* (European Anti-Poverty Network 2010).

[131] On the discussion of the legal basis for an EU instrument creating the right to a minimum income, see H Verschueren, 'Union Law and the Fight Against Poverty: Which Legal Instruments?', in B Cantillon, H Verschueren and P Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2012) 208–213. See also P Schoukens and J Beke Smets, 'Fighting Social Exclusion under the EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations?' [2014] *European Journal of Social Security* 16.

[132] See Vonk, *supra* note 127, 16–18 for a more detailed presentation of this idea.

[133] See Article 2(j) and Article 13(1) and (5) of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers [2003] OJ L 31/18.

[134] Case C-79/13 *Saciri and others* nyr [35]–[42].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

2003/9 as from 21 July 2015.[135] So EU law obliges Member States to provide an adequate standard of living for all third-country nationals present on their territory who have applied for international protection. The Court of Justice has explicitly linked this requirement to the obligation under Article 1 of the EU Charter to respect human dignity. Therefore, suggesting that such a requirement should also be introduced for indigent EU citizens who have made use of their fundamental right to free movement would be very reasonable.

Moreover, very recently the EU has set up a Fund in order to support the Member States in providing material assistance to the most deprived. The Fund for European Aid to the Most Deprived (FEAMD), created by Regulation 223/2014[136] and worth €3.8 billion in real terms in the 2014–2020 period, will financially support Member States' actions to provide a broad range of non-financial material assistance including food, clothing and other essential goods for personal use for materially deprived people. It complements the Structural Funds. The Fund is a recent example of how the EU could alleviate the financial burden of providing assistance to deprived persons.

VI. TO CONCLUDE

From the above analysis it follows that the EU has difficulties in reconciling the right to free movement of persons and to equal treatment as a fundamental right with a constitutional status on the one hand with the policy objectives of fighting poverty and social exclusion explicitly laid down in the Treaty provisions and policy documents on the other. As a result of European integration as an economic principle, economic migrants have almost automatic access to financial support by the host State to help them avoid poverty. It demonstrates the resilience of the EU's market integration rationale and the dominance of 'mercantile' citizenship.[137] Yet, we see that the most recent case law seems to impose prior integration conditions on economic migrants as well. Moreover, the secondary law provisions and the Court of Justice's case law leave a number of blind spots and gaps, in particular for migrant workers who temporarily interrupt their economic activity and consequently lose their status of worker. In addition, non-economic migrants face legal limitations on the fundamental right to free movement and to equal treatment. Their right to reside in a Member State depends on not being an 'unreasonable' burden on the social assistance system of the host State. Indigent EU migrants even face the risk of being expelled from the Member State where they reside because of the burden they would place on the host State's social

[135] See Articles 2(g), 17 and 21–24 of Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L180/96.

[136] Regulation (EU) No 223/2014 of the European Parliament and of the Council of 11 March 2014 on the Fund for European Aid for the Most Deprived [2014] OJ L72/1.

[137] See for a recent analysis O'Brien, *supra* note 59. See also F De Witte, 'Transnational Solidarity and Conflicts of Justice' (2012) 18 *EL Journal* 705–706; N Nic Shuibhne, 'The Resilience of EU Market Citizenship' (2010) 47 *CML Rev* 1597–1628; Ploscar, *supra* note 46, 241–242; and D Schiek, *Economic and Social Integration. The Challenge for EU Constitutional Law* (Edward Elgar 2012) 48–49.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

assistance system.[138] Limitations on their right to equal treatment for social minimum benefits may lead to destitution as a consequence of the exercise of the fundamental right to free movement.

So, it appears that the EU conditions imposed upon economically active as well as inactive migrants to obtain the right to reside and to social benefits in the host State is not based on a genuine sense of solidarity. The discussions about the impact of EU law on the boundaries of national solidarity systems question the extent to which European integration can legitimately contribute to a cross-border form of solidarity between Member States and their citizens. The fundamental right to free movement as well as to equal treatment seems to conflict with the traditional territorial understanding of interpersonal solidarity which presupposes 'the "willingness" of citizens to share with "others" within the same "political community"'.[139] Apart from the structural funds the EU currently lacks a redistribution instrument and criteria for distributive justice. As Poiares Maduro has put it: 'this limited version of the European social self does not really recognise Europe's right and legitimacy to establish and exercise an independent redistributive function'.[140] Hence, European citizenship continues to lack the 'social' dimension as identified by Marshall.[141] This is still the domain of the Member States. It explains the ambiguity between free movement and the combating of poverty on the one hand, and the Member States' concerns to protect their social systems from 'foreign intruders' on the other. It also contrasts with the US federal integration process, which has created a shared responsibility for welfare with the US Constitution, thus enabling the federal government to adopt redistributive policies via tax-and-spend powers. In the US, poverty problems caused by the 'migrating poor' are perceived as issues requiring cooperation of the states and the federal government, based on a sink-or-swim-together rationale, which no longer entitles states to exclude from social assistance indigent migrants coming from other US states who want to reside on their territory.[142]

A comparable redistributive system is still lacking at EU level, the introduction of which would need a stronger political commitment to an EU-wide combating of poverty and social exclusion and the will to transfer powers and financial resources to the EU. The recently established FEAMD is a modest first example of how the EU

---

[138] Recently a question submitted to the Commission in the European Parliament (Parliamentary question E-000183-14) revealed that for this reason Belgium expelled 343 EU citizens in 2010. In 2011 their number grew to 989, and in 2012 it doubled, reaching 1,918. In the first nine months of 2013, another 1,130 EU citizens were expelled for this.

[139] De Witte, *supra* note 137, 697. See also M Ferrera, *The Boundaries of Welfare* (Oxford University Press 2005) 46.

[140] M Poiares Maduro, 'Europe's Social Self: "The Sickness Unto Death"', in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 341.

[141] TH Marshall, *Citizenship and Social Class and Other Essays* (Cambridge University Press 1950).

[142] Van der Mei, *supra* note 126, 178–203. This part of his book contains an in-depth analysis and comparison of the US and EU free movement rights and entitlement to social benefits for indigent migrant persons. See also AP Van der Mei, 'Freedom of Movement for Indigents: a Comparative Analysis of American Constitutional Law and European Community Law' (2002) 19 *Arizona Journal of International and Comparative Law* 803–861. See also Lenaerts, *supra* note 99, 400–402.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

could possibly take more redistributive initiatives. However, it remains to be seen whether the EU will be able to develop more advanced redistribution systems. Meanwhile, the right to social minimum benefits for migrant EU citizens will remain nested in the national systems and the nation-bound forms of solidarity.[143] In this context the EU cannot but take into account the Member States' wish to protect their welfare states from intruders. Therefore, the EU will continue to struggle with the ambiguity of its legal instruments and policy goals and will remain far from the objective which van der Mei formulated as follows: 'When taken seriously, Union citizenship ought to be developed in such a way that both the "rich and the poor" can enjoy the rights that come with it.'[144]

BIBLIOGRAPHY

Armstrong, K (2010), Governing Social Inclusion. Europeanization through Policy Coordination, Oxford: OUP.

Besson, S and A Utzinger (2007), 'Introduction: Future Challenges of European Citizenship – Facing a Wide-Open Pandora's Box', EL Journal **13** 573.

Bräuninger, D (2015), *Debate on free movement. Does the EU need new rules on social security co-ordination?* (Deutsche Bank)

Cantillon, B and N Van Mechelen (2012), 'Between Dream and Reality. On Anti-Poverty Policy, Minimum Income Protection and the European Social Model', in B Cantillon, H Verschueren and P Ploscar (eds), Social Inclusion and Social Protection in the EU: Interactions between Law and Policy, Antwerp: Intersentia, 173–204.

Cantillon, B and F Vandenbroucke (eds) (2014), Reconciling Work and Poverty Reduction. How Successful Are European Welfare States?, Oxford: Oxford University Press.

Closa Montero, C (2010), '*Martinez Sala* and *Baumbast*: An Institutionalist Analysis', in M Poiares Maduro and L Azoulai (eds), The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, Oxford: Hart Publishing, 394–401.

Copeland, P and M Daly (2012), 'Varieties of Poverty Reduction: Inserting the Poverty and Social Exclusion Target into Europe 2020', Journal of European Social Policy **22**, 273–287.

Cornelissen, R (2013), 'EU Regulations on the Coordination of Social Security Systems and Special Non-Contributory Benefits: A Source of Never-Ending Controversy', in E Guild, S Carrera and K Eisele (eds), Social Benefits and Migration. A Contested Relationship and Policy Challenge in the EU, Brussels: Centre for European Policy Studies (CEPS), 91 ff.

Currie, S (2009), 'The Transformation of Union Citizenship', in M Dougan and S Currie (eds), 50 Years of the European Treaties, Oxford: Hart Publishing, 374–376.

Dawson, M and B De Witte (2012), 'The EU Legal Framework of Social Inclusion and Social Protection', in B Cantillon, H Verschueren and P Ploscar (eds), Social Inclusion and Social Protection in the EU: Interactions between Law and Policy, Antwerp: Intersentia, 54–57

De Witte, F (2012), 'Transnational Solidarity and Conflicts of Justice', EL Journal **18** 705–706.

Dougan, M (2006), 'The Constitutional Dimension to the Case Law on Union Citizenship', EL Rev **31** 623.

Dougan, M (2013), 'The Bubble that Burst: Exploring the Legitimacy of the Case Law on the Free Movement of Union Citizens', in M Adams, H de Waele, J Meeusen and G Straetmans (eds), Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice, Oxford: Hart Publishing, 132.

[143] M Ferrera, 'Modest Beginnings, Timid Progress: What's Next for Social Europe', in B Cantillon, H Verschueren, and P Ploscar (eds), *Social Inclusion and Social Protection in the EU: Interactions between Law and Policy* (Intersentia 2012) 17–27; and Ploscar, *supra* note 46, 215–216 and 317.

[144] Van der Mei, *supra* note 126, 220.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

Dougan, M and E Spaventa (2005), '"Wish You Weren't Here …". New Models of Social Solidarity in the European Union' in E Spaventa and M Dougan (eds), Social Welfare and EU Law, Oxford: Hart Publishing, 204–205.
Ferrera, M (2005), The Boundaries of Welfare, Oxford: Oxford University Press.
Ferrera, M (2012), 'Modest Beginnings, Timid Progress: What's Next for Social Europe', in B Cantillon, H Verschueren and P Ploscar (eds), Social Inclusion and Social Protection in the EU: Interactions between Law and Policy, Antwerp: Intersentia, 17–27.
Ferrera, M and S Sacchi (2007), 'A More Social EU? In What Areas? In What Forms?', European Governance **1** 18.
Frazer, H and E Marlier (2009), Minimum Income Schemes Across EU Member States, Brussels: EU Network of National Independent Experts on Social Inclusion.
Frazer, H, E Marlier and I Nicaise (2010), A Social Inclusion Roadmap for Europe 2020, Antwerp: Garant.
Fuchs, M (ed) (2013), Europäisches Sozialrecht, Baden-Baden: Nomos.
Giubboni, S (2007), 'Free Movement of Persons and European Solidarity', EL Journal **13** 371–372.
Golynker, O (2005), 'Jobseekers' Rights in the European Union: Challenges of Changing the Paradigm of Social Solidarity', EL Rev **30**, 120.
Guild, E (2014), 'Does European Citizenship Blur the Borders of Solidarity?', in E Guild, C Gortazar Rotaeche and D Kostakopoulou (eds), The Reconceptualization of European Union Citizenship, Leiden-Boston: Martinus Nijhoff, 206.
Guild, E, S Peers and J Tomkin (2014), The EU Citizenship Directive, Oxford: Oxford University Press.
Hailbronner, K (2005), 'Union Citizenship and Access to Social Benefits', CML Rev **42** 1245–1267.
Heidenreich, M and P Zeitlin (eds) (2009), Changing European Employment and Welfare Regimes: the Influence of the Open Method of Coordination on National Labour and Social Welfare Reforms, London: Routledge.
ICF and Milieu Ltd (2013), A fact finding analysis on the impact on the Member States' social security systems of the entitlements of non-active intra-EU-migrants to special non-contributory cash benefits and healthcare granted on the basis of residence, http://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=1980&furtherNews=yes#!:
José Menéndez, A (2010), 'European Citizenship after *Martinez Sala* and *Baumbast*: Has European Law Become More Human but Less Social?', in M Poiares Maduro and L Azoulai (eds), The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, Oxford: Hart Publishing, 363–393.
Kostakopoulou, D (2012), 'The European Court of Justice, Member State Autonomy and European Union Citizenship: Conjunctions and Disjunctions', in A Micklitz and B De Witte (eds), The European Court of Justice and the Autonomy of the Member States, Antwerp: Intersentia, 175–203.
Larkin, P (2005), 'The Limits to European Social Citizenship in the United Kingdom', ML Rev **68** 440–442.
Lenaerts, K (2011), 'European Union Citizenship, National Welfare Systems and Social Solidarity', Jurisprudence **18** 398–400.
Lenaerts, K and T Heremans (2006), 'Contours of a European Social Union in the Case-Law of the European Court of Justice', European Constitutional Law Review **2** 103.
Marshall, TH (1950), Citizenship and Social Class and Other Essays, Cambridge: Cambridge University Press.
Minderhoud, P (2014), 'Directive 2004/38 and Access to Social Assistance', in E Guild, C Gortazar Rotaeche and D Kostakopoulou (eds), The Reconceptualization of European Union Citizenship, Leiden-Boston: Martinus Nijhoff, 209–225.
Morsa, M (2012), Sécurité sociale, libre circulation et citoyenneté européennes, Limal: Anthemis.
Nic Shuibhne, N (2010), 'The Resilience of EU Market Citizenship', CML Rev **47** 1597–1628.
Nic Shuibhne, N and M Maci (2013), 'Proving Public Interest: The Growing Impact of Evidence in Free Movement Case Law', CML Rev **50** 1002.
NNS (2010), 'Editorial. Three Paradoxes of EU Citizenship', EL Rev **35** 129–130.
Nogler, L (2010), 'Rethinking the Laurie-Blum Doctrine of Subordination: A Critical Analysis Prompted by Recent Developments in Italian Employment Law', International Journal of Comparative Labour Law and Industrial Relations **26** 83–101.
O'Brien, C (2009), 'Social Blind Spots and Monocular Policy Making: The ECJ's Migrant Worker Model', CML Rev **46** 1107–1141.
O'Brien, C (2011), 'Drudges, Dupes and Do-gooders. Competing Notions of "Value" in the Union's Approach to Volunteers', European Journal of Social Law **1** 49–75.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

O'Brien, C (2013), 'I Trade, Therefore I Am: Legal Personhood in the European Union', CML Rev **50** 1643–1684.
O'Leary, S (2005), 'Solidarity and Citizenship Rights in the Charter of Fundamental Rights of the European Union', in G De Búrca (ed), EU Law and the Welfare State. In Search of Solidarity, Oxford: Oxford University Press, 73.
O'Leary, S (2008), 'Developing an Ever Closer Union between the Peoples of Europe? A Reappraisal of the Case Law of the Court of Justice on the Free Movement of Persons and EU Citizenship', Yearbook of European Law, 167–193.
Peña-Casas, R (2012), 'Europe 2020 and the Fight against Poverty and Social Exclusion: Fooled into Marriage?', in D Natali and B Vanhercke (eds), Social Developments in the European Union 2011, Brussels: ETUI, OSE, 159–185.
Pennings, F (2012), 'EU Citizenship: Access to Social Benefits in Other EU Member States', International Journal of Comparative Labour Law **28** 333.
Pennings, F (2015), European Social Security Law, 6th edn, Antwerp: Intersentia.
Ploscar, P (2014), The Principle of Solidarity in EU Internal Market Law, PhD, Antwerp: University of Antwerp.
Poiares Maduro, M (2000), 'Europe's Social Self: "The Sickness Unto Death"', in J Shaw (ed), Social Law and Policy in an Evolving European Union, Oxford: Hart Publishing, 341.
Schiek, D (2012), Economic and Social Integration. The Challenge for EU Constitutional Law, Cheltenham-Northampton, MA: Edward Elgar.
Schoukens, P and J Beke Smets (2014), 'Fighting Social Exclusion under the EU Horizon 2020. Enhancing the Legal Enforceability of the Social Inclusion Recommendations?', European Journal of Social Security **16** 51.
Shaw, J (2010), 'A View of the Citizenship Classics: *Martinez Sala* and Subsequent Cases on Citizenship of the Union', in M Poiares Maduro and L Azoulai (eds), The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty, Oxford: Hart Publishing, 362.
Somek, A (2007), 'Solidarity Decomposed: Being and Time in European Citizenship', EL Rev **32** 787–818.
Spaventa, E (2010), 'The Constitutional Impact of Union Citizenship', in U Neergaard, R Nielsen and L Roseberry (eds), The Role of Courts in Developing a European Social Model. Theoretical and Methodological Perspectives, Copenhagen: DJOF Publishing, 165.
Thym, D (2013), 'Towards "Real" Citizenship? The Judicial Construction of Union Citizenship and its Limits', in M Adams, H de Waele, J Meeusen and G Straetmans (eds), Judging Europe's Judges. The Legitimacy of the Case Law of the European Court of Justice, Oxford: Hart Publishing, 155–174.
Thym, D (2015), 'The Elusive Limits of Solidarity: Residence Rights of and Social Benefits for Economically Inactive Union Citizens', CML Rev **52** 17–50.
Timmermans, Ch (2010), '*Martinez Sala* and *Baumbast* Revisited', in M Poiares Maduro and L Azoulai (eds), The Past and Future of EU Law. The Classics of EU Law Revisited on the 50th Anniversary of the Rome Treaty. Oxford: Hart Publishing, 348.
Van der Mei, AP (2002), 'Freedom of Movement for Indigents: a Comparative Analysis of American Constitutional Law and European Community Law', Arizona Journal of International and Comparative Law **19** 803–861.
Van der Mei, AP (2002), 'Regulation 1408/71 and Co-ordination of Social Non-contributory Benefit Schemes', EL Rev **27** 551–566.
Van der Mei, AP (2003), Free Movement of Persons within the European Community. Cross-Border Access to Public Benefits, Oxford: Hart Publishing.
Van der Mei, AP (2005), 'Union Citizenship and the "De-Nationalisation" of the Territorial Welfare State', EJML **7** 207–209.
Van Lancker, A (2010), Working Document on a Framework Directive on Minimum Income, Brussels: European Anti-Poverty Network.
Van Overmeiren, F, E Eichenhofer and H Verschueren (2014), 'Social Security Coverage of Non-Active Persons Moving to Another Member State', in E Guild, C Gortazar Rotaeche and D Kostakopoulou (eds), The Reconceptualization of European Union Citizenship, Leiden: Martinus Nijhoff, 257.
Van Peijpe, T (2012), 'EU Limits for the Personal Scope of Employment Law', European Labour Law Journal **3** 35–54.
Verschueren, H (2007), 'European (Internal) Migration Law as an Instrument for Defining the Boundaries of National Solidarity Systems', European Journal of Migration and Law **9** 307–346.
Verschueren, H (2009), 'Special Non-Contributory Benefits in Regulation 1408/71, Regulation 883/2004 and the Case Law of the ECJ', European Journal of Social Security **11** 217–234.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

Verschueren, H (2012), 'Union Law and the Fight Against Poverty: Which Legal Instruments?', in B Cantillon, H Verschueren, and P Ploscar (eds), Social Inclusion and Social Protection in the EU: Interactions between Law and Policy, Antwerp: Intersentia, 208–213.
Verschueren, H (2014), 'Free Movement or Benefit Tourism: The Unreasonable Burden of Brey', European Journal of Migration and Law **16**, 147–179.
Verschueren, H (2015), 'Preventing "Benefit Tourism" in the EU: A Narrow or Broad Interpretation of the Possibilities Offered by the ECJ in *Dano*', CML Rev **52,** 363–390.
Vielle, P (2012), 'How the Horizontal Clause can be made to Work: The Lessons of Gender Mainstreaming', in N Bruun, K Lörcher and I Schömann (eds), The Lisbon Treaty and Social Europe, Oxford: Hart Publishing, 105–121.
Vonk, G (2014), Homelessness and the Law: Challenges for the European Union. Paper presented at the 21st International Conference of Europeanists, Washington DC, 14–16 March 2014.
Wollenschläger, F (2011), 'A New Fundamental Freedom beyond Market Integration: Union Citizenship and its Dynamics for Shifting the Economic Paradigm of European Integration', EL Journal **17** 1–34.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:55:56PM
via University College London (UCL)

17. Social security protection of migrants from outside Europe

*Gijsbert Vonk**

I. INTRODUCTION

Migration has never been a European affair only but has always extended all over the world. This is reflected in the state of international social security law. Not only is there a global web of bilateral social security relations between all possible countries in the world, there are also international conventions dealing with the worldwide protection of social security rights. Actually, the first global convention which calls upon countries to enter into bilateral social security agreements and which includes general standards on the protection of migrants' rights dates back to 1925.[1]

But despite this, the protection of migrants who move between the regions in the world is far from perfect. Western countries which are not very willing to facilitate transnational alignments of migrants increasingly restrict their social security schemes to their own territories in a phenomenon that I have referred to elsewhere as 'national retrenchment'.[2] This trend may make it more difficult to export benefits abroad and to take into account periods of insurance completed in other countries. Furthermore, key immigration countries in the EU often remain outside the network of bilateral treaties of the Member States. For example, there are no UK social security agreements with countries from the Indian subcontinent. And as for the global ILO co-ordination standards, the number of ratifications is stunningly low. The latest state-of-the-art convention, the Maintenance of Social Security Rights Convention of 1982 (No 157) only received four ratification: Kyrgyzstan, the Philippines, Spain and Sweden. Consequently, many migrants moving in and out the EU are still left without any protection.

* This chapter is an improved and updated version of an earlier publication entitled G Vonk, 'Social Security rights of Migrants: Links between the Hemispheres' in R Blanpain et al (eds, *Social Security and Migrant Workers Selected Studies of Cross-Border Social Security Mechanisms*, Bulletin of Comparative Labour Relations (Wolters Kluwer 2014) 47–68. For the latest contemporary treatise of EU social security law for persons coming from outside Europe, see Danny Pieters and Paul Schoukens (eds), *The Social Security Co-ordination Between the EU and Non-EU Countries* (Intersentia 2009). I am indebted to Rob Cornelissen who made valuable comments to the first draft of this chapter.

[1] Equality of Treatment (Accident Compensation) Convention 1925 (no 19). For an overview of ILO instruments on the protection of social security rights of migrants, see International Labour Office, *Social Security for Migrant Workers* (ILO 1972).

[2] See Gijsbert Vonk and Sarah van Walsum, 'Access Denied: Towards a New Approach to Social Protection for Formally Excluded Migrants', in Gijsbert Vonk (ed), *Cross-Border Welfare State, Immigration, Social Security and Integration* (Intersentia 2012) 3–59, 25–27.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

The purpose of this chapter is to discuss how EU law can help to bridge the gap in migrant workers' social security protection by facilitating the protection of rights of persons moving in and out the EU. One of the things I will look into is a phenomenon that I refer to as *co-ordination creep*, i.e. the dynamics within existing bodies of EU co-ordination law to extend the scope of application beyond the national boundaries of the co-ordination zone, thus becoming relevant for migrants who move in and out of this zone. In Section II, I will explore these dynamics from the point of view of positive EU co-ordination law. The central question is how EU social security law impacts upon the legal position of people moving between the EU and other regions of the world. I will then move forward to Section III by discussing a number of strategic options for protecting migrant workers moving between the EU and other regions in the world, which go beyond the mere spill-over effects of existing EU co-ordination law. These options vary from adopting unilateral protective standards to signing up to the major global instruments on the protection of migrant workers. In between these options, some attention is paid to the possibility of linking up regional co-ordination standards, establishing an EU-Ibero-American pact.

II. EU CO-ORDINATION CREEP

For the purposes of this section I will use a limited, technical concept of EU social security law. It covers Article 48 TFEU and two regulations which are based upon this article, i.e. no. 883/2004 (formerly 1408/71) and no. 987/2009 (formerly 574/72), as well as social security obligations entered into by the EU with third states. Also I include other provisions which may be invoked in order to claim social security benefits in situations of in- or extra-Community mobility, most notably the prohibition of discrimination on grounds of nationality (cf. *inter alia* Article 18, Article 45 TFEU, Article 7(2) Regulation 492/2011 (formerly 1612/68) and Article 24 Directive 38/2004/EC) and the provisions on European citizenship (especially Article 20 and Article 21 TFEU). The non-discrimination rule and the notion of European citizenship have an extra value for EU social security law in addition to Regulation 883/2004. The Court of Justice frequently solves social security cases on the grounds of these principles in cases where migrants are assumed not to be adequately protected by Regulation 883/2004.

In this section attention is paid to three subjects:

- the extra-territorial scope of application of EU social security law (to what extent does EU social security law apply to persons and events situated outside the territory of the EU Member States?);
- the extra-national scope of application of EU social security law (to what extent does EU law apply to non-EU nationals?);
- the EU-status of bi- and multilateral social security agreements and EU agreements with third countries.

These are three major subjects of EU law which have given rise to an abundance of case law and doctrine. The objective is to give a very brief description of the state of

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

the law, with reference to the TFEU, case law of the Court of Justice and legal writing. For each of the subjects the general starting points are followed by a more detailed discussion of specific questions which are directly relevant for people moving between the hemispheres. The questions that have thus been selected are the following:

With regard to the extra-territorial scope of application of EU social security law:

- To what extent is EU social security law applicable where a person works outside one of the EU Member States?
- Should a person be resident in one of the EU Member States in order to successfully invoke Regulation 883/2004?

With regard to the extra-national scope of application of EU social security law:

- Under what conditions can third-country nationals invoke the principle of non-discrimination on grounds of nationality and Regulation 883/2004?
- What is the relevance of the so-called 'migration criterion' for the application of the foregoing question?

With regard to the status of national and EU social security agreements with third states:

- How does EU law affect the application of bi- and multilateral agreements concluded by the Member States with third states?
- What is the legal effect of the social security paragraphs' co-operation and association agreements concluded between the EU and third countries?

The answer to these questions is summarised in a paragraph by means of 'preliminary conclusions'.

II.i The Extra-territorial Scope of Application of EU Social Security Law

II.i.a Legal framework

Article 52 of the EU Treaty defines the geographical application of the Treaty and, by doing so, also the application of secondary EU legislation. According to Article 299, European Union law is applicable in the territory of the Member States of the EU. Furthermore, Article 355 TFEU gives Member States an opportunity to regulate the status of their overseas territories in Annex II of the Treaty.

Together with their dates of accession, the Member States of the EU are Austria (1995), Belgium (founding member: 1958), Bulgaria (2007), Croatia (2013), Cyprus (2004), Czech Republic (2004), Denmark (1973), Estonia (2004), Finland (1995), France (founding member: 1958), Germany (founding member: 1958), Greece (1981), Hungary (2004), Ireland (1973), Italy (founding member: 1958), Latvia (2004), Lithuania (2004), Luxembourg (founding member: 1958), Malta (2004), the Netherlands (founding member: 1958), Poland (2004), Portugal (1986), Romania (2007), Slovakia (2004), Slovenia (2004), Spain (1986), Sweden (1995) and the United Kingdom (1973).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

For the purpose of this chapter it is assumed that EU social security law is also applicable to three remaining countries of the European Free Trade Association (EFTA), Iceland, Liechtenstein and Norway. The reason for doing so is that since the conclusion of the treaty on the European Economic Area in 1993,[3] these countries have been linked to the main EU instrument, Regulation 883/2004.

For Switzerland a separate situation applies. After the Swiss people voted against the participation of Switzerland in the European Economic Area in the 1992 referendum, it was decided that social security relations should be established on a bilateral basis. Thus there is a separate agreement on the freedom of movement of persons, which also links up Switzerland to the EU co-ordination regulations.[4]

The continental shelf is part of EU territory, at least the EU has functional jurisdiction on this part of the North Sea. This means that the EU co-ordination regulations on social security apply to activities that are carried out on the continental shelf. Thus, on 7 January 2012 the Court of Justice held that a Dutch radiographer, Mr Salamink, working on a the Dutch part of the continental shelf, was subject to Dutch social security legislation on the basis of the conflict rules included in the then co-ordination Regulation 1408/71.[5]

Extra-territorial application of the non-discrimination rule The fact that the territorial application is confined to the territory of the Member States (and their overseas territories as defined in Article 355, Annex II TFEU),[6] does not preclude European Union rules from having effects outside the territory of the Union. The Court of Justice has consistently held that provisions of Community law may apply to professional activities performed outside Community territory as long as the employment relationship retains a sufficiently close link with the Community.

The oldest court ruling (1974) concerned Mr Koch, a Dutch national and a professional cyclist behind motorcycles (so-called 'pacemakers'), who participated in a championship in Spain, at that time not yet a member of the EU.[7] He invoked the principle of non-discrimination of the EC Treaty on the grounds of nationality, because the rules of the Union Cycliste Internationale stipulated that the pacemaker must be of the same nationality as the cyclist. Mr Koch wanted Mr Walrave, not a Dutch national, to be his pacemaker. The European Court of Justice opened the door to the application of the Community law outside the territory of the Member States:

> 5. The rule on non-discrimination applies to all legal relationships which can be located within the territory of the community by reason either of the place where they are entered into or of the place where they take effect.

---

[3] [1993] OJ L347/2.

[4] [2002] OJ L114.

[5] Case C-347/10 *Salamink*, nyr.

[6] The status of overseas territories is complex. See Dimitry Kochenov (ed), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories* sui generis (Wolters Kluwer 2011).

[7] Case C-36/74 *Walrave/Koch* [1974] ECR 01405.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

The Court left it to the national court to establish if there were indeed sufficient grounds to link the economic relation to EU territory.

In subsequent case law dealing with Regulation 1612/68 the Court of Justice has frequently elaborated on the starting point of *Walrave/Koch*. An important step forwards was made in the *Lopez-da Veiga* case.[8] Mr Lopez-da Veiga was a Portuguese seaman who had worked for years on ships flying the Dutch flag. During periods of leave he spent his time in the Netherlands. He was denied a Dutch residence permit because the Dutch authorities did not consider his stay on board Dutch ships as a stay in the Netherlands. However, the European Court of Justice decided that Mr Lopez-da Veiga had a sufficiently close connection with the territory of the Netherlands for the application of Community law (in this case Regulation 1612/68):

> 17. … the applicant works on board a vessel registered in the Netherlands in the employ of a shipping company incorporated under the law of the Netherlands and established in that State; he was hired in the Netherlands and the employment relationship between him and his employer is subject to Netherlands law; he is insured under the social security system of the Netherlands and pays income tax in the Netherlands.

The most far-reaching Court ruling dates from 1995.[9] Ms Boukhalfa was a Belgian national. Since 1 April 1982, she had been employed on the local staff of the German Embassy in Algiers. She was hired in Algiers. Prior to entering into her contract, Ms Boukhalfa was already established in Algeria, where she also had her permanent residence. German labour law differentiates between German and non-German diplomatic staff (e.g. different wage levels). Ms Boukhalfa wanted to be equally paid on the basis of the EU non-discrimination principles as laid down in Regulation 1612/68. Germany, on the other hand, argued that Community law was not applicable to the present case because its scope of application is limited, under the EC Treaty, to the territory of the Member States of the EU and Ms Boukhalfa's situation was not that of a national of a Member State employed in another Member State but she had always worked in a non-Member country. Nevertheless the Court ruled that the employment relationship of Ms Boukhalfa had a sufficiently close link with the EU for EU law to be applied to that relationship.

> 16. In the present case, it is clear from the documents before the Court that the plaintiff's situation is subject to rules of German law in several respects. First, her contract of employment was entered into in accordance with the law of the Member State which employs her and it is only pursuant to that law that it was stipulated that her conditions of employment were to be determined in accordance with Algerian law. Secondly, that contract contains a clause giving jurisdiction over any dispute between the parties concerning the contract to the courts in Bonn and, ultimately, Berlin. Thirdly, the plaintiff in the main proceedings is affiliated for pension purposes to the German State social security system and is subject, though to a limited extent, to German income tax.
>
> 17. In situations such as that of the plaintiff in the main proceedings, Community law and thus the prohibition of discrimination based on nationality contained in the abovementioned

[8] Case C- 9/88 *Lopez-da Veiga* [1989] ECR 02989.
[9] Case C-214/94 *Boukhalfa* [1996] ECR I-02253.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

> Community provisions are applicable to all aspects of the employment relationship which are governed by the law of a Member State.

These rulings show that the Court has released the definition of the territorial scope of application of the non-discrimination rule from the narrow confines of its strict geographical meaning. Instead, there should be a sufficiently close connection between the employment relation and the legal order of the EU.

Extra-territorial application of Regulation 883/2004 Regulation 883/2004 does not contain a general provision about its territorial scope of application. Because of that the territorial application is subject to the same restrictions and extensions as the EU Treaty. Indeed, there are several indications that the Regulation was originally meant to be applied within the territory of the Member States only.

Thus, Article 7 Regulation 883/2004 ensures the payment of benefits abroad, but only if the beneficiary lives in the territory of another Member State. Furthermore, Articles 11 to 16 dealing with the determination of applicable legislation explicitly refer to persons living or working in the Member State of the European Union. But some other provisions do not contain such explicit references to territorial scope of application. Thus, for example, the non-discrimination rule on grounds of nationality included in Article 3 Regulation 883/2004 no longer refers to persons residing in a Member State of the EU, while the text of this article in the forerunning Regulation 1408/71 still did.

II.i.b Specific questions

In the previous section, it was pointed out that the territorial scope of application of Regulation 883/2004 is determined by Article 52 of the EU Treaty. It was also pointed out that Community law sometimes goes beyond the borders of the EU if there remains a sufficiently strong economic tie with the EU. In this section, I will discuss two specific questions regarding the extra-territorial effect of Community law which are connected with Regulation 883/2004.

Can Regulation 883/2004 be applied to employment relations outside the EU? Title II of the Regulation (Articles 11–16) contains a set of rules that determine the legislation applicable to a migrant worker. The rules apply in situations in which workers are in one way or another engaged in cross-border activities. The objective of these rules is to avoid cases where persons are not covered by the social security legislation of any Member State ('negative conflict'), or when they are simultaneously covered by the legislation of two or more Member States ('positive conflict'). To realise this objective, Article 11(1) stipulates that a person can be subject to the legislation of one Member State only (the competent Member State).

But what legislation should apply in a concrete situation? To answer this question, the provisions of Title II contain rules that designate the applicable legislation, the so-called 'rules of conflict'. The general starting point for these rules is the principle that a person is subject to the legislation of the Member State where he works, even if he resides in another Member State (*lex loci laboris*). This starting point is embodied in Article 11(3)(a) for employees:

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

> … a person pursuing an activity as an employed or self-employed person in a Member State shall be subject to the legislation of that Member State;

For other groups of persons, such as workers who are engaged in transport, seamen or persons who work simultaneously in two countries, specific rules of conflict on the applicable legislation have been adopted.

The explicit reference to the Member State in which a person is employed as competent Member State suggests a further obstacle for the application of Title II to employment relations outside the territory of the EU. However, the Court of Justice has extrapolated the above-mentioned case law to the application of Title II: if there is a sufficient relationship with the legal order of (one of the Member States of) the EU, the applicable legislation can be established by the rules of conflict of the Regulation.

The Court decided this in the *Aldewereld* case.[10] Mr Aldewereld was a Dutch national who was resident in the Netherlands when he took a job with an undertaking established in Germany, which posted him immediately to Thailand, where he worked during 1986. During 1986 Mr Aldewereld was liable in Germany to pay social security contributions in respect of sickness, unemployment, old age and accidents according to German domestic social security legislation. Over the same year, Mr Aldewereld was – on the basis of residency – also insured under the Netherlands legislation in respect of old age and survivor's pension. The question arose as to whether this 'positive conflict' was covered by Article 13(2)(a) Regulation 1408/71, in spite of the fact that Mr Aldewereld performed his activities in Thailand. The Court of Justice answered this question positively:

> 14. It follows from the case-law of the Court … that the mere fact that the activities are carried out outside the Community is not sufficient to exclude the application of the Community rules on the free movement of workers, as long as the employment relationship retains a sufficiently close link with the Community. In a case such as this, a link of that kind can be found in the fact that the Community worker was employed by an undertaking from another Member State and, for that reason, was insured under the social security scheme of that State.

This was not yet the end of the story, since there is no specific rule of conflict tailored to this situation. Here too, referring to the objective of Title II, the Court of Justice links the applicable legislation to the Member State in which the economic point of gravity can be located, *in casu* Germany where the employer is registered:

> 24. In a case such as that in the main proceedings, the legislation of the Member State of the worker's residence cannot be applied, since there is no factor connecting that legislation with the employment relationship, unlike the legislation of the State where the employer is established, which must therefore be applied.

At this point the conclusion should be that the case law regarding the extra-territorial effect of Regulation 1612/68, which was discussed above, also applies to Title II of Regulation 883/2004. This has subsequently been reaffirmed by the Court of Justice in the *Bakker* case, which dealt with a Dutch national living in Spain and working on

[10] Case C-60/93 *Aldewereld* [1994] ECR I-02991.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

board dredgers flying the Netherlands flag for an undertaking established in Rotterdam.[11] According to the Court of Justice, working under the Dutch flag constituted a sufficient link with the territory of the European Union, even though most of the activities were carried out in the territorial seas of China and of the United Arab Emirates.

Should a person be resident in one of the EU Member States in order to successfully invoke Regulation 883/2004? The previous paragraph was concerned with the question as to whether Title II of Regulation 883/2004 can have extra-territorial effect in cases where persons work outside the territory of the EU. The present question goes a step further, and deals with the situation of persons living outside the territory of the EU. Can Regulation 883/2004 be invoked by persons who are resident in a third state? This is a controversial question, which up until now has not yet been finally resolved in the case law of the Court of Justice.[12] The case adopts a pragmatic approach on the basis of which it depends on the specific provision in question whether one lives on EU territory.

Indicative for this pragmatic approach is the case of *Chuck v Sociale Verzekeringsbank* of 3 April 2008.[13] Mr Chuck was a British national who had worked and was resident in the Netherlands from 1972 to 1975 and then for a brief period from 1976 to 1977. In the nine months between those two periods he worked in Denmark, where he paid social security contributions. Since 1978 he had been resident in the United States. On reaching the age of 65, he submitted a claim for an old-age pension to the SVB. The SVB granted Mr Chuck an old-age pension, but for the calculation of the amount of the pension the SVB did not take account of the periods of insurance completed in Denmark, on the ground that Mr Chuck no longer resided in a Member State and, according to the SVB, could not claim the benefit of Article 48 of Regulation No 1408/71. This article obliges the SVB to take into account small periods of insurance completed in other Member States.

In the case that followed, the SVB suggested that it was unthinkable that Regulation 1408/71 would be applicable to all residents outside the EU. It would result in a global export obligation. However, the Court of Justice declined to answer the question of whether the Regulation applies to non-EU residents in a general manner. The Court simply stated that Article 48 Regulation 1408/71 does not depend on the place of residence of the worker when he claims an old-age pension. Hence, it cannot be interpreted as meaning that the mere fact that a person has moved his place of residence to a non-Member State will call into question his right to have his old-age pension calculated in accordance with the rules set out in that article. However, according to the Court of Justice this does not automatically mean that on the basis of the Regulation social security benefits should be made exportable all over the world. In this respect the Court observed:

---

[11] Case C-106/11, *M.J. Bakker*, nyr.

[12] The residence clause in Article 2 Regulation 883/2004 only refers to refugees and stateless persons, as was the case in Article 2 of forerunner Regulation 1408/71. This interpretation is confirmed by recital 13 of Regulation 1231/2010.

[13] Case C-331/06 *Chuck* [2008] ECR I-01957.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

> The Court, following the example of the Advocate General, would point out that, while Article 10 of Regulation No 1408/71 introduces a binding right to have a pension paid in any Member State, neither that regulation nor any provision of Community law requires Member States to pay pensions in non-Member States. It follows that the detailed arrangements for paying such an old-age pension remain subject to the provisions of the national law of the Member State of the institution responsible for paying the pension.

The latter restriction formulated by the Court of Justice did not harm Mr Chuck as this pension was fully exportable under the Dutch–US social security agreement.

II.i.c Preliminary conclusions as to the extra-territorial scope of application

EU social security law is primarily confined to the territory of the EU Member States. Nonetheless there a limited number of exceptions to the strict territorial application. Extra-territorial application is possible when the employment relationship of a person is closely linked to the legal order of the Member States. Such a situation may occur when a person is temporarily employed in a third country by an employer who is established in the Union. This person will remain protected by the TFEU provision on the freedom of movement of workers and is equally covered by the single state rule underlying Title II of Regulation 883/2004. With regard to persons living outside the Union, the situation with regard to EC social security law is ambiguous. The only thing that can be said with certainty is that persons living outside the EU can invoke the protection of the principle of non-discrimination on grounds of nationality and rules on the aggregation of insurance periods in order to claim social security rights under the legislation of Member States under which they are or have been insured. However, the export rule as established in Article 7 Regulation 883/2004 does not apply to the territory outside the EU.

II.ii Extra-national Scope of Application of EU Social Security Law

II.ii.a Legal framework

The personal scope of application of EU social security law traditionally extends to workers in an employed and self-employed capacity, as well as to the members of their families. The present Regulation 883/2004 is simply applicable to all persons who are or have been subject to the social security legislation of the Member States.[14] For the TFEU the notion of European citizenship applies, overarching various subdivisions between employed workers, the self-employed, students, pensioners, etc. Every person holding the nationality of one of the Member States is granted citizenship. And even though Article 21 TFEU merely stipulates that citizens of the Union shall enjoy the rights conferred by the EC Treaty, the Court of Justice has found in this article a major source of inspiration to extend the scope of freedom of movement rights to those who were previously without protection, most notably persons who are economically not

[14] Article 2 Regulation 883/2004.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

active. This has also had a major impact on the possibility to claim all sorts of social benefits in an intra-Community context.[15]

For the purposes of this chapter, the main question to be considered is whether persons not holding the nationality of an EU Member State are protected by EU social security law: to what extent are third-country nationals protected by the relevant EU rules?

In order to answer this question properly, it must be pointed out that neither the TFEU regime governing the freedom of movement of persons nor the TFEU provisions on European citizenship apply to third-country nationals.[16] The EU has no competence to extend any protection to third-country nationals, except on the basis of Title IV, Chapter 2 dealing with a common immigration policy for the Union (border checks, asylum and immigration) (Articles 77–80 TFEU).[17] On the basis of Title IV a growing body of directives have come into being which have an impact on access to social security (*lato sensu*) for third-country nationals residing in Member States of the EU. A characteristic of most of these directives is that they mostly protect well-defined, limited groups of persons such as researchers (Directive 2005/71/EC), asylum seekers (Directive 2003/9/EC to be replaced by Directive 2013/33 EU), victims of human trafficking (Directive 2011/36/EC), migrants who are engaged in return proceedings to their home countries (Directive 2008/15/EC), etc. Only two directives stand out as having a more general scope of application.

These are permanent long-term residents (Directive 2003/109/EC) and so-called blue card holders applying to highly qualified third-country workers (Directive 2009/50/EC). Both directives contain provisions which are relevant for social security (see below).

(a) third-country nationals enjoying protection under directives based on the common immigration policy of the Union, most notably long-term residents and blue card holders;
(b) members of the families of EU nationals who make use of their right to freedom of movement within the Union (traditionally covered by the co-ordination regulations and by the prohibition of discrimination on grounds of nationality);
(c) persons who satisfy the conditions of Regulation 1231/2010, extending the scope of application of Regulation 883/2004 to third-country nationals.

In the next section I will consider under what conditions these categories of third-country nationals can invoke the relevant legislation. Furthermore I will specifically pay attention to the question of the extent to which the third-country national should satisfy

---

[15] See C Barnard, 'EU Citizenship and the Principle of Solidarity', in M Dougan and E Spaventa (eds), *Social Welfare and EU Law* (Hart Publishing 2005); K Hailbronner, 'Union Citizenship and Access to Social Benefits' [2005] *CMLRev* 1245–1267.

[16] See the definition of Article 20 TFEU. With regard to Article 45 TFEU (freedom of movement of workers) the restriction to nationals of the Member States has been formulated in secondary legislation, but not in the treaty provision itself. The Court excepted the restriction in Case C-48/75 *Royer* [1976] ECR 00497.

[17] Denmark and Ireland have negotiated an opt-out for these measures taken on the basis of Title IV, Chapter 2 TFEU.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

the so-called 'migration criterion', i.e. the condition that a person must have moved between two or more Member States of the European Community.

II.ii.b Specific questions

Under what conditions can third-country nationals invoke EU social security law?
With regard to the possibility to invoke equality of treatment *for persons with permanent residence*, Directive 2003/109/EC primarily requires that the third-country national acquires 'long-term residence status'. This depends inter alia on the duration of residence in the host state (five years), stable resources and adequate health insurance. Interestingly, the right to equality of treatment in the area of social security, social assistance and social protection is granted by the directive[18] independently of the right to move to another Member State. In other words third-country nationals with permanent residence status can invoke equality of treatment in order to obtain social advantages in their host state, even if they have not migrated within the European Union. The 'migration criterion' (see below) is not applicable. On the other hand, there is an important restriction: long-term residence status terminates when a third-country national remains outside the Member State for more than 12 months. As a result, Directive 2003/109/EC is of no avail to third-country nationals who have returned to their home countries and who claim social security rights under the legislation of their former EU-states of residence. The Blue Card Directive 2009/50/EC introduces a regime for entry and residence of *highly qualified third-country workers*. Not only will these workers be given access to the labour market, but they are also entitled to equal labour and social security conditions (Article 14). However, the unemployed blue card holder only enjoys this protection for limited duration (Article 13), while equality of treatment in 'procedures for obtaining housing' may be restricted (Article 14(2)).

Members of the family of a European citizen[19] have always enjoyed protection under the non-discrimination rule irrespective of their nationality. Directive 2004/38/EC now defines 'family member' as:

a. the spouse;
b. the partner with whom the Union citizen has contracted a registered partnership … ;
c. the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point b;
d. the dependant direct relatives in the ascending line and those of the spouse or partner as defined in point b.[20]

These members of the family enjoy the same equality of treatment on grounds of nationality as the European citizens from which they derive their states.[21] However, it is a condition that the member of the family resides in the territory of the Member State. Hence, third-country family members who have returned to their home countries are without protection. Furthermore, it is required that the European citizen who is related

[18] By Article 11(1)(d) Directive 2003/109/EC.
[19] Be it in an employed, self employed or any other capacity.
[20] Article 2(2) Directive 2004/38/EC; this article replaced Article 10 of Regulation 1612/68.
[21] Article 24 Directive 2004/38/EC.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

to the member of the family can himself be qualified as a person who exercised the right to freedom of movement between two or more Member States. Unlike Regulation 2003/109, which is discussed above, the 'migration criterion' is fully applicable. Thus, for example, in the case of *Poirrez*[22] the Court of Justice did not allow a disabled child from the Ivory Coast who was adopted by a French national access to the principle of non-discrimination as a 'member of the family', in order to claim a French allowance for handicapped persons. The reason was that the French father had always lived in France. Unlike Directive 2003/109, Directive 2004/38/EC is exclusively written for the freedom of movement of citizens within Europe.

Last, but not least *third-country nationals* are now fully covered by Regulation 883/2004.[23] This extension is essentially realised by one article of a separate Regulation (no. 1231/210) based upon the present Chapter 2 Title IV of the TFEU, dealing with immigration policy:

> Regulation (EC) No 883/2004 and Regulation (EC) No 987/2009 shall apply to nationals of third countries who are not already covered by those Regulations solely on the ground of their nationality, as well as to members of their families and to their survivors, provided that they are legally resident in the territory of a Member State and are in a situation which is not confined in all respects within a single Member State.[24]

There are three aspects to be taken into account. Firstly, the territorial scope of application. Denmark is not in the arrangement, nor are the EEA countries: Norway, Iceland and Liechtenstein.[25] The result is that third-country nationals cannot claim any advantages from Regulation 883/2004 arising from their migration between a Member State and any of these four countries. Secondly, the requirement of *legal* residence. There is no common definition of this term in Community law. Eventually it is the qualification under national immigration law which determines whether a person is to be considered legal or not legal. It is to be expected that the Member States fall back on the requirement that the third-country national is in possession of a valid residence permit. Thirdly, there is the 'migration criterion', uniquely codified in Article 1 Regulation 1231/2004 in the requirement that the situation should not be 'confined in all respects within a single Member State'. The meaning of this requirement is the subject of the next question.

---

[22] Case C-206/91 *Poirrez* [1992] ECR I-06685. Years later on 30 September 2003 Poirrez's claim was finally recognised by the European Court of Human Rights under the European Convention on Human Rights.

[23] Before this extension third-country nationals could already invoke most provisions of the co-ordination Regulation as family members and survivors of mobile EU citizens. The scope of these rights was considerably extended when it became apparent in Case C-308/93 *Cabanis-Issarte* [1996] ECRI-02097 that the family members may invoke all provisions of Regulation 1408/71 except for the ones specifically designed for employed persons (such as the rules on unemployment benefits).

[24] Article 1 Regulation 1231/2010.

[25] Switzerland has now accepted the Regulation within its separate agreement with the EU.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

What is the relevance of the so-called 'migration criterion' in applying EU social security law to third-country nationals? The purpose of the Regulation is to protect persons from the loss of social security rights following upon the movement between two or more EU Member States. From this it follows that purely internal matters, with no *intra-Community connection* are outside the scope of protection of Regulation 883/2004 and the treaty regime governing the freedom of movement of persons. Thus, in 2008 the Court of Justice still refused to apply EU law in a controversy between the devolved French- and Dutch-speaking governments in Belgium about the right to Flemish care insurance for Walloon citizens in cases which are solely within the internal sphere of Belgium.[26]

When there is only a link between one Member State and a third state, the situation is equally disregarded by the EU regime on the freedom of movement. This became apparent in the cases of *Khalil and others*.[27] These cases involved a number of Palestinian stateless persons or refugees whose claim for German child benefits had been rejected by the German authorities on grounds of their insufficient status under German immigration law. They claimed that the refusal of benefits was contrary to the non-discrimination rule of Article 3 Regulation 1408/71. The Court did not accept this claim because there was no intra-Community connection. The Court admitted the situation would be different if these persons had moved to France and subsequently back to Germany. Had this been the case, Regulation 1408/71 would have been applicable.

It should be pointed out that Regulation 883/2004 does not impose strict standards for a person to satisfy the migration criterion. It suffices that in some way or other, by moving his place of work or residence, a person should be in contact with the social security legislation of more than one Member State. In the case of family benefits the intra-Community connection can also arise when one of the parents does not live in the same country as the children.[28]

II.ii.c Preliminary conclusions as to the extra-national scope of application

It can be concluded that third-country nationals are covered by EU social security law in the same way as EU citizens, subject to the criteria of:

- intra-Community movement ('migration criterion'), and
- legality of residence.

This means that third-country nationals are protected against a loss of social security rights following from their movement between the EU Member States.

Outside Regulation 883/2004, third-country nationals are only protected by the non-discrimination rule. They are entitled to this protection either as permanent status holders within the meaning of Directive 2003/309/EC, as blue card holders or as family members of EU citizens. For permanent status and blue card holders the migration

[26] Case C-212/06, *Walloon government v Flemish government* [2008] ECR I-01683.
[27] Cases C-95/99 to 98/99 *Khalil cs* [2001] ECR I-07413.
[28] Case 115/77 *Laumann* [1978] ECR 00805.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

criterion does not apply. This status terminates once the person has left the EU Member State for longer than 12 months.

II.iii The Status of National and of EU Social Security Agreements with Third Countries

II.iii.a Legal framework

National social security agreements Regulation 883/2004 does not contain any rules on the status of national social security agreements, other than Article 8, stipulating that the regulation replaces agreements which apply between the Member States themselves. With regard to agreements with third states, the situation is rather governed by the TFEU. The general rule here is adopted in Article 351 TFEU, according to which EU law may not stand in the way of any rights and obligations which arise from agreements that the Member States have concluded with third states. However, this does not mean to say that while applying agreements with third states the Member States are no longer bound by EU law in relation to each other. This issue played a role in the *Gottardo* case,[29] which dealt with a French lady who made a claim under the Italian-Swiss social security convention, which is only applicable to nationals of the contracting parties.

Mrs Gottardo had worked successively in Italy, Switzerland and France. She was in receipt of Swiss and French old-age pensions, which were granted to her without any need for aggregation of periods of insurance. Mrs Gottardo wished to obtain an Italian old-age pension pursuant to Italian social security legislation. However, even if the Italian authorities took into account the periods of insurance completed in France, in accordance with Article 45 of Regulation 1408/71, aggregation of the Italian and French periods did not enable her to achieve the minimum period of contributions required under Italian legislation for entitlement to an Italian pension. Mrs Gottardo would only be entitled to an Italian old-age pension if account were also taken of the periods of insurance completed in Switzerland pursuant to the aggregation principle referred to in Article 9(1) of the Italian-Swiss convention.

The Court ruled that it was contrary to the principle of non-discrimination on grounds of nationality to deny Mrs Gottardo access to the convention.

> It follows from the case-law that, when giving effect to commitments assumed under international agreements, be it an agreement between Member States or an agreement between a Member State and one or more non-member countries, Member States are required, subject to the provisions of Article 307 EC [now Article 351 TFEU, GV], to comply with the obligations that Community law imposes on them. The fact that non-member countries, for their part, are not obliged to comply with any Community-law obligation is of no relevance in this respect.
>
> … when a Member State concludes a bilateral international convention on social security with a non-member country … , the fundamental principle of equal treatment requires that that Member State grant nationals of other Member States the same advantages as those which its own nationals enjoy under that convention unless it can provide objective justification for refusing to do so.

[29] Case C-55/00 *Gottardo* [2002] ECR I-00413.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

According to the Court this ruling was possible in view of the fact that in this case the unilateral extension of the convention by the Italians in no way impaired the interests of the Swiss Confederation. The conclusion is that social security conventions with third states must be applied in the same way for EU citizens, as long as this does not lead to any extra obligations for the social security institutions of the third state.

EU social security agreements with third states Entering into social security relations for the purposes of protecting migrant workers is not an exclusive national competence. It is a mixed competence. Indeed, the EU has a long tradition of adopting so-called social paragraphs in 'association', 'stabilisation', 'co-operation' and 'partnership' agreements with third states all over the world. It is here that we can truly speak of EU links between the hemispheres, at least potentially, because, as we will see, in practice the implications are limited.

The social security paragraphs of many EU agreements also contain provisions on the social security protection for migrant workers. These paragraphs normally provide a basis for the introduction of social security instruments that are based upon techniques comparable to those adopted in Regulation 883/2004. However, only in relation to Turkey has such an instrument been developed,[30] although even here efforts to apply this instrument by adopting further implementation measures have been aborted. The result is that for third-country citizens these paragraphs remain without any tangible legal (direct) effect, until the treaty partners have adopted further measures. Apart from the legal effect attributed by the Court of Justice to the social security paragraphs within the EU legal order itself (see below), these paragraphs remain sleeping beauties, waiting to be brought to life with a kiss by further measures of the contracting parties.

II.iii.b Specific questions

How does EU law affect national social security agreements An interesting consequence of the *Gottardo* ruling, which was discussed earlier, is that bi- and multilateral social security agreements that have been concluded with third states should now apply to all persons who are subject to Regulation 883/2004. Furthermore, as a result of the extension of Regulation 883/2004, also non-EU nationals may benefit from this situation. In my eyes this is the most far-reaching consequence of *co-ordination creep* so far. The *Gottardo* effect is not merely that it extends the personal scope of application of agreements, which is possibly restricted to nationals of the contracting states only, to all persons covered by Regulation 883/2004. It also has an effect on the application of so-called open agreements, which apply simply to all persons who are or have been subject to the legislation of the contracting parties, irrespective of nationality. The modern approach is that countries adopt such open agreements. Take, for example, the 2007 Ibero-American Multilateral Agreement on Social Security, which entered into force in 2011 between Spain and Portugal and a number of ratifying South American states (Argentina, Brazil, Bolivia, Chile, Ecuador, El Salvador, Paraguay, Uruguay and Venezuela). This is a modern multilateral instrument crafted very much along the lines of Regulation 883/2004. It has the same open, personal scope of application, so

[30] Decision 3/80 of the Association Council EEC-Turkey.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

seemingly applying the *Gottardo* principle is not a prerequisite for applying the Multilateral Agreement to – let us say – a French citizen who has worked in Spain and in South America. The effect of *Gottardo*, however, goes further: suppose the French citizen has completed periods of insurance in France, Spain and Argentina. The Spanish authorities are now under an obligation to totalise the insurance periods in all three countries for the purpose of calculating Spanish pension for our Frenchman living in the EU. In other words, through the intervention of the *Gottardo* principle a single EU-Iberian-American co-ordination area has been created. Of course there are still important *lacunae*. For example, the EU export rule does not apply between Europe and the South American agreement members. Also the *Gottardo* principle may not invoke new obligations for South American countries. These extra steps are waiting for an intercontinental co-ordination effort between the EU and the signatories of the multilateral agreements. This is something I will dwell upon further in Section III.

What is the legal effect of agreements concluded between the EU and third countries? The social security paragraphs of the EU agreements with third states are merely framework articles establishing a ground for developing further social security ties between the contracting parties. As in none of the cases such ties have actually been developed, a separate body of EU co-ordination law vis-à-vis third states has simply not yet come into being. The good news is nevertheless that the Court of Justice has held that the prohibition on grounds of nationality included in social security paragraphs of EU agreements has direct effect in the EU legal order. This means, for example, that a Moroccan national living in France can invoke the Euro-Mediterranean agreement with Morocco in order to claim equal treatment under French social security legislation.[31] The claim does not depend upon the Moroccan national having any ties with another EU Member State: the requirement of intra-Community migration does not apply. Remarkably, ever since direct effect was proclaimed by the Court to the prohibition of discrimination on grounds of nationality, new EU agreements concluded with central and eastern European states no longer include such prohibition. Instead this new generation of EU agreements only refers to other co-ordination principles such as the export benefits and the totalisation of insurance periods. The latest news, however, is that the Court seems to be of the opinion that also the export clause can be invoked directly by citizens without further implementation measures having been introduced. This became apparent in a case involving a number of Turkish citizens who claimed they were entitled to export Dutch supplementary allowances to their invalidity benefits on the basis of the export clause of Article 6 of Decision 3/80 of the Association Council EEC-Turkey. That claim was accepted by the Court,[32] which held that Article 6 had direct effect in the EU legal order.

---

[31] Case C-18/90 *Kziber* [1991] ECR I-00199. For a similar conclusion in relation to decision 3/80 of the Association Council EEC-Turkey Case 262/96 *Sürül* [1999] ECR I-02685.

[32] Case C-485/07 *Akdas c.s.* [2011] ECR I-04499.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

II.iii.c Preliminary conclusions as to the status of national and EU social security agreements

Through the operation of EU law, in particular the ruling in *Gottardo*, national agreements with third countries must be applied to all persons covered by Regulation 883/2004. The result is that EU Member States must take into account third-country periods of insurance, while establishing title to benefits for EU migrants. This may result in large co-ordination zones, in particular when EU Member States have entered into multilateral agreements with third states, such as the Iberian-American Multilateral Social Security Agreements. These co-ordination zones are, however, not fully reciprocal as the *Gottardo* ruling cannot impose obligations on third states.

As for EU social security alignments, there are many but so far these have not yet led to any EU third-country social security instruments. In the meantime the Court of Justice allows third-country nationals to directly invoke the non-discrimination clauses included in the social security paragraphs and, seemingly, the export clauses as well.

III. EXTENDING SOCIAL SECURITY PROTECTION TO PERSONS MOVING IN AND OUT OF THE EU

While it is true that EU co-ordination law stretches out beyond its own borders, thus becoming relevant for migrants who work or reside outside the EU, the fact remains that a real co-ordination regime between the EU and other regions in the world has not come into being. EU agreements with third countries do create a framework for such regimes but so far no concrete measures have been introduced. Obviously, this affects most of all migrants from countries with which no bilateral social agreements have been concluded, as is the case for a large majority of developing countries. In this last section I will discuss a number of strategic options to fill this gap.

III.i Unilateral Efforts

III.i.a From an EU perspective

A drawback pertaining to the system of EU bilateral social security relations is that a co-ordination effort with third states is not very likely when social security systems have not yet come into being in those states. This would lead *a fortiori* to a very asymmetrical sort of co-ordination. Perhaps this is the reason why establishing co-ordination ties with the poorest countries in the world is not envisaged. It would explain why the EU partnership agreement with the African, Caribbean and Pacific Group of States, signed in Cotonou on 23 June 2000 (and amended in 2005)[33] is silent about the whole issue of social security for migrant workers. In the meantime, for the poorest migrants who find their way to Europe and who return to their home countries, there is just no international social security protection at all. This is an undesirable situation. As early as 1997 the ILO listed expelling migrants without regard to the social security rights arising out of past employment or residence as one of the ten most

[33] http://ec.europa.*eu*/europeaid/where/acp/overview/documents/cotonou-consolidated-fin-ap-2012_en.pdf.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

exploitative practices in the world today.[34] The latter practice is typically one that is allowed to exist in the absence of international co-ordination standards. In my view the European Union should at least impose a number of minimum requirements which apply unilaterally to the treatment of third-country migrants, such as equality of treatment on grounds of nationality, the exportability of benefits and the totalisation of insurance periods for the right to benefit. Such unilateral standards are not as far fetched as they seem. Indeed, they have already been adopted for asylum seekers (Directive 2003/9/EC), for victims of human trafficking (Directive 2004/81) and, most importantly from the point of view of our subject, in the recent Directive 2011/98/EU on a single application procedure for a single permit for third-country nationals to reside and work in the territory of a Member State. Not only does this directive stipulate equality of treatment for labour immigrants claiming social security rights in the Union, but it also requires benefits to be exported outside the Union under the same conditions as those which apply to nationals of the Member States (Article 12(4)). This is a modest start at least.

III.i.b From a third-country (sending state) perspective

A short comment should also be made about unilateral efforts by sending states. Social security systems sometimes extend their coverage to national citizens living and working abroad, for example by allowing for optional continued insurance. Such facilities gain importance when emigrants live and work in countries with which no social security ties have been established. In this way, for example, the Albanian social insurance system provides the opportunity for emigrants to remain affiliated to the system on a voluntary basis, creating protection for the hundreds of thousands of Albanians working abroad, often in undeclared work and/or without authorisation of the immigration authorities.[35]

Sometimes extra-territorial responsibility manifests itself in more complex forms. An example of this is the Philippine government's initiative to support workers overseas. Increasing problems associated with working abroad have made migrant protection and representation an important priority for the Philippine government. One of the Philippine institutions providing migrant protection is OWWA, an institutionalised welfare fund that seeks to protect Filipino migrant workers abroad. OWWA is funded by a mandatory membership fee payable by the emigrants and by government grants. It offers support services for participation in pre-departure orientation seminars, public assistance programmes for people in need, on-site services at embassies and consulates, and an OWWA identification system.[36] Apparently inspired by the success of the Philippine fund, Sri Lanka has also come up with an initiative to help its workers

[34] Tripartite meeting of experts on future ILO activities in the field of migration, *Protecting the Most Vulnerable of Today's Migrants* (ILO 1997) 2.

[35] Potential, because so far the voluntary scheme has not been overly successful in attracting in participants. In 2009 the number had risen to 23,900 persons. See ISSA, 'Managing of Voluntary Insurance, The Case of the Social Insurance Institute in Albania', in *Good Practices in Social Security* (Geneva 2010).

[36] N Ruiz, *Managing Migration: Lessons from the Philippines*, Migration and Development Brief no 6, (World Bank 2008).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

abroad. The Sri Lanka Overseas Workers Welfare fund covers payments to migrants and their families in the event of death, disability or a need to cover travel expenses.[37]

These examples show how countries of origin can take increased responsibility for their migrants' social security in the absence of receiving country commitments.[38] In my view this responsibility must be actively encouraged by the international community as part of a strategy for the alternative social security protection for vulnerable migrants.

III.ii Bi- and Multilateral Co-ordination Efforts

III.ii.a Bilateral efforts

Another way to improve social security protection of migrants moving between the various regions of the world is to proceed with pressing for co-ordination measures within the framework of EU third-country agreements. Indeed, this seems to be the approach advocated by the European Commission in a policy document on the external dimension of social security co-ordination. The Commission has proposed closer social security co-ordination with four countries: Albania, Montenegro, San Marino and Turkey. Proposed social security measures are based on obligations contained in existing EU Association Agreements with these four countries (in the case of San Marino it is based on a Customs and Cooperation Agreement) where there is a commitment to implement a set of limited social security co-ordination rules with EU Member States.[39] However, speedy results cannot be expected from this. There is the division of competences between the EU and its Member States to be taken into account. Traditionally, entering into bilateral social security obligations is considered to be a national competence and the EU Member States are not so likely to pass on this competence to the supranational EU bodies, especially not to the much-feared and powerful Court of Justice. As long as the EU Member States stick to their national competences, the development of a body of bilateral EU co-ordination law is not very likely. Incidentally, also third states may have a preference to negotiate agreements with the individual Member States, rather than with the powerful EU block as a whole. This is reportedly the case for Morocco, which has never been a strong supporter of EU efforts to come to any co-ordination instrument under the Euro-Mediterranean agreement.[40] So perhaps the EU should rather concentrate on developing social security relations with third states in areas where the individual Member States are at a disadvantage, such as large countries like China and the USA.

---

[37] ILO, *Best Practices in Social Insurance for Migrant Workers: The Case of Sri Lanka. ILO Asian Regional Programme on Governance of Labour Migration, Working Paper 12* (ILO 2008).

[38] See W. van Ginneken, *Making social security accessible to migrants, Paper presented at the World Social Security Forum* (ISSA 2008).

[39] [2012] COM(153 final).

[40] See Abdellah Boudahrain, 'The Insecure Social Protection of Migrant Workers from the Maghreb' [2000] *International Social Security Review* 47–74.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

III.ii.b Multilateral efforts: Towards an EU-Ibero-American co-ordination pact

Another possibility for extending the co-ordination network is trying to link up EU co-ordination law with similar co-ordination instruments that exist elsewhere in the world.

A unique possibility that has come up is to create a link between EU co-ordination law and the 2007 Ibero-American Multilateral Agreement on Social Security. Creating such a link is a possibility for various reasons. In the first place the Multilateral Agreement is set up almost completely on the lines of the latest EU Regulation 883/2004. This makes it technically feasible to establish a liaison between the two instruments. In the second place, two EU Member States, Spain and Portugal, are already covered by both co-ordination regimes. Thirdly, due to the large number of participants in the Multilateral Agreement it is not very likely that alternative bilateral relations can be created with individual EU Member States and all the South American countries involved. Fourthly, an EU-Ibero-American co-ordination zone would be beneficial to all the parties, as the migration streams run not only from South to North, but, ever since the economic crisis, also from North to South, thus creating a true equilibrium of interests.

In the most minimal form an EU-Ibero-American co-ordination pact could codify the *Gottardo* principle (supra Section II.iii.a.), which already applies for Spain and Portugal vis-à-vis persons who fall under the scope of Regulation 883/2004. If this principle were to be made reciprocal this would mean that Spain and Portugal would also have to take into account periods of insurance completed in other EU Member States while calculating a pension under the Ibero-American Multilateral Agreement. In this option, it is Spain and Portugal that is the bridge that bears the brunt of the EU-American co-ordination effort, which is perhaps a little unfair. A second option would therefore probably be better, namely to assume a general obligation for all the states involved to take into account periods of insurance completed in the entire co-ordination zone, while calculating pensions under either the Ibero-American Agreement or Regulation 883/2004.

For pensions the overarching rule can be quite straightforward: when Regulation 883/2004 applies, the Member States shall take into account American periods of insurance and vice versa, when the Ibero-American applies, the contracting states must take into account EU periods of insurance. This principle should probably be accompanied by a conflict rule should both co-ordination instruments apply simultaneously to one person. Such overlapping of instruments could easily occur where the Ibero-countries are involved, especially taking into account the Court of Justice's ruling in *Gottardo* and in *Chuck* (supra II.iii.a. and II.i.b.). This problem could be solved by giving preference to the most favourable instrument for the person concerned,[41] along the same lines it could be stipulated that the Euro-Ibero-American co-ordination pact shall not affect any rights and obligations arising from existing or future bilateral agreements concluded between any of the states involved. Of course, the co-ordination

[41] A fair tradition in most of the international co-ordination instruments. Cf inter alia Article 6(1) European Convention on Social Security 1972 and Article 17(1) of the Maintenance of Social Security Rights Convention 157 and in a somewhat attenuated way, Article 8(1) Regulation 883/2004.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

pact should then also include provisions on the administrative co-operation between the competent authorities, the exchange of forms, etc. Indeed, if a Euro-Ibero-American pact could be established, it would be the first multilateral intercontinental co-ordination instrument in history. In our view, studying the feasibility of such pact, based on different scenarios, is highly recommended.

III.iii Adhering to Global Standards

There are global standards on the social security protection of migrant workers. The most important and far-reaching instruments to be mentioned here are ILO Convention No 157 on the Maintenance of Social Security Rights and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families. The ratification record of both conventions is dismal: four countries for ILO Convention No 157 and 45 for the UN Migration Workers Convention, none of which are from the North and from large middle-income countries, except Mexico and Turkey. In view of this blatant lack of interest of the national states, perhaps it is time for international organisations to start to exercise some mild pressure. For example, the European Parliament and the Commission could place EU membership of these conventions on the agenda.

IV. SUMMARY

The way EU co-ordination law impacts on non-EU migrants depends very much on the specific circumstances of the case. It is a consequence of intricate legal constructions hidden in secondary legislation or principles which have been developed by the European Court of Justice. However, this does not mean to say that the impact of EU rules is minimal. Thus, for example, the main EU instrument on the co-ordination of social security rights, Regulation 883/2004, is fully applicable to third-country nationals. EU co-ordination law may also have extra-territorial effect. For example, the principle of non-discrimination on grounds of nationality in EU law can be invoked by persons who are resident outside the EU. The principle may also affect the way Member States should apply bi- and multilateral social security agreements with third countries vis-à-vis persons who fall under the scope of Regulation 883/2004. Finally, we must bear in mind that the EU itself also has obligations with third countries, thus creating new social security obligations for its Member States which can be invoked by third-party nationals in the EU legal order. It is the combined effect of such rules that makes EU law relevant for persons moving between Europe and other regions of the world.

Still, there are a number of *lacunae* to be addressed. I observed that even though EU third-party agreements create a framework for this, a true body of intra-continental co-ordination law has not yet come into being due to a lack of any further co-ordination measures adopted by the contracting parties of such agreements. This means that large groups of migrant workers who move in and out Europe are still left without any protection.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

I suggested three strategic options to address this issue. The first option is to establish unilateral obligations. For the EU the social security guarantees adopted in the single permit Directive 2011/98/EU can be seen as a strong precedent for this approach. The second option is to enter into more bilateral and multilateral liaisons. An exciting prospect in this respect is a Euro-Ibero-American co-ordination pact, created by linking together the operation of Regulation 883/2004 and the Ibero-American Multilateral Social Security Agreement. I discussed a number of implications of such a pact for the totalisation of insurance periods. The feasibility of an EU-Ibero-American pact deserves further study. The third option raised (at least from a theoretical point of view) is that the EU would adhere to global protective standards, such as ILO Convention No 157 on the Maintenance of Social Security Rights and the UN Convention on the Protection of the Rights of All Migrant Workers and Members of their Families.

BIBLIOGRAPHY

Barnard, C (2005), 'EU Citizenship and the Principle of Solidarity', in EM Dougan and E Spaventa (eds), *Social Welfare and EU Law*, Oxford and Portland: Hart Publishing.

Boudahrain, Abdellah (2000), 'The Insecure Social Protection of Migrant Workers from the Maghreb', *International Social Security Review* 47–74.

Hailbronner, K (2005), 'Union Citizenship and Access to Social Benefits', *CMLRev* 1245–1267.

ILO (2008), *Best Practices in Social Insurance for Migrant Workers: The Case of Sri Lanka. ILO Asian Regional Programme on Governance of Labour Migration, Working Paper 12*, Geneva: ILO.

Kochenov, Dimitry (ed) (2011), *EU Law of the Overseas: Outermost Regions, Associated Overseas Countries and Territories, Territories* sui generis, Alphen a/d Rijn: Wolters Kluwer.

Pieters, Danny and Paul Schoukens (eds) (2009), *The Social Security Co-ordination Between the EU and Non-EU Countries*, Antwerp: Intersentia.

Ruiz, N (2008), *Managing Migration: Lessons from the Philippines*, Migration and Development Brief no. 6, Washington: World Bank.

Van Ginneken, Wouter (2008), *Making Social Security Accessible to Migrants, Paper presented at the World Social Security Forum*, Cape Town: ISSA.

Vonk, G (2014), 'Social Security Rights of Migrants: Links between the Hemispheres' in R Blanpain et al. (eds), *Social Security and Migrant Workers: Selected Studies of Cross-Border Social Security Mechanisms*, Bulletin of Comparative Labour Relations, Alphen a/d Rijn: Wolters Kluwer 47–68.

Vonk, Gijsbert and Sarah van Walsum (2012), 'Access Denied: Towards a New Approach to Social Protection for Formally Excluded Migrants', in Gijsbert Vonk (ed), *Cross-Border Welfare State, Immigration, Social Security and Integration*, Antwerp: Intersentia 3–59.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:23PM
via University College London (UCL)

18. Coordination of student financial aid systems: Free movement of students or free movement of workers?

Anne Pieter van der Mei

I. INTRODUCTION

In order to facilitate the exercise of EU free movement rights, the EU legislator has set in place an extensive regime coordinating national social security systems. Regulations 883/2004[1] and 987/2009[2] do not guarantee that EU citizens who move from one member state to another retain their 'social security income'. Cross-border movement may imply a change in the applicable legislation, and, hence, in entitlement to a lower benefit or no benefit at all. What the regulations do guarantee, among other things, is that EU citizens exercising their free movement rights are not excluded from the social security legislation of the member state they have moved to *and* the legislation of the member state they have moved from. Regulation 883/2004 prevents 'negative conflicts of law' by designating one member state as the competent one ('single state rule').[3] It is that member state that must apply its legislation and it is in that member state that EU citizens, provided they satisfy the substantive conditions for entitlement to benefits, can claim benefits regardless of their nationality[4] or place of residence.[5]

As free movement of persons includes free movement of students, one might perhaps have expected that the EU institutions also would have adopted measures aimed at coordinating national financial support systems for students. This, however, is only partially the case. Regulation 883/2004 does include coordination rules for family benefits, which – as they are awarded to students' parents – often are referred to as indirect support systems.[6] Direct support systems taking the form of study grants and/or loans granted to students themselves, however, are not covered by the regulation.

In fact, the EU institutions even seem opposed to student financial aid coordination. The EU legislator has never seriously considered bringing such aid systems within the scope of Regulation 883/2004. Worse, the EU institutions have even expressly allowed

[1] Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems [2004] OJ L166.

[2] Regulation (EC) No 987/2009 of the European Parliament and of the Council of 16 September 2009 laying down the procedure for implementing Regulation (EC) No 883/2004 on the coordination of social security systems [2009] OJ L 284.

[3] Article 11(1) Regulation 883/2004.

[4] Article 4 Regulation 883/2004.

[5] Article 7 Regulation 883/2004.

[6] J Vossensteyn, *Portability of Student Financial Support. An Inventory in 23 European Countries* (Ministerie van Onderwijs, Cultuur en Wetenschap 2004).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

both the host member state (i.e. the state where students attend education) and the home state (i.e. the one students moved from and lived in prior to their training) to derogate from general treaty obligations so as to allow them to limit EU students' rights to student financial aid. Thus, the EU legislator has permitted – with the approval of the Court of Justice[7] – the host member state to ignore the non-discrimination duty imposed by Article 18 TFEU and to deny EU students coming from other member states grants and loans meant to compensate for costs of maintenance.[8] Further, when member states voluntarily decide to award aid for foreign studies, the Court only reviews the conditions for entitlement they attach to it under Article 21 TFEU on free movement of persons. The Court does not interfere with the member states' decision whether or not to make aid portable: EU law does not impose 'any obligation' on the home member state 'to provide a system of education or training grants for studies pursued in another Member state'.[9]

Thus, when it comes to maintenance aid, EU law does not link national systems to each other in a manner comparable to, and equally successful as, the social security regulations do. EU students may fall between two stools. To be sure, the EU institutions and the member states are aware of this and they do recognise that non-entitlement to grants or loans may hamper student mobility, the promotion of which constitutes a core objective of both the EU's educational policy[10] and the so-called 'Bologna process'.[11] However, the EU institutions and the Bologna partners have merely sought to fill the gap in financial support by issuing legally non-binding measures that merely call upon (member) states to make grants or loans available for 'mobile students'.

As such, there is nothing wrong with such a 'soft' approach, which may very well be regarded as an appropriate tool for promoting the policy goal of encouraging student mobility. And admittedly, it has been quite successful. In recent years, various member states have introduced 'portable aid' programmes, enabling an increasing number of students to attend foreign colleges or universities.[12] What is curious, however, is that the EU institutions and the 'Bologna partners' seem to view studying abroad only as a policy aim, which they are free to pursue to the extent that, or in the way, they deem fit. Not all member states have introduced portable aid and the ones that have usually attach conditions to it, which often are aimed at reserving portable aid for certain

---

[7] Case C-158/07 *Förster* [2008] ECR I-8507.

[8] More concretely, Article 24(2) of Directive 2004/38 stipulates that the host state is under no obligation to grant maintenance aid to EU citizens who have not yet acquired permanent residence. In the remainder of this contribution the term student financial aid means, unless otherwise expressly indicated, maintenance aid.

[9] Case C-220/12 *Thiele Meneses* [2013] ECR I-0000 [25]; Case C-275/12 *Elrick* [2013] I-0000 [25].

[10] Article 165(2) TFEU.

[11] S Garben, *EU Higher Education Law: The Bologna Process and Harmonization by Stealth* (Kluwer Law International 2011).

[12] Q Lam et al, *Portable State Grants and Loans: An Overview and their Contribution to Outgoing Student Mobility* (Lemmens Medien GmbH 2013), ACA Papers on International Cooperation in Education, available at: www.aca-secretariat.be/fileadmin/aca_docs/images/members/ACA-2014_Portable_State_Grants_and_Loans_PDF.pdf.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

categories of students to the exclusion of others.[13] What the responsible policymakers – be they European, 'Bolognian' or national – ignore is that studying abroad is also, and above all, a constitutional right[14] that nationals of the Member states enjoy in their capacity of citizens of the Union.[15]

For this very reason, it is submitted that the soft law approach does not suffice. Whilst the Treaty does not impose on the EU institutions – as it does in the field of social security[16] – an explicit duty to coordinate national student financial aid systems, it is arguably desirable to supplement soft law instruments with hard law coordination measures aimed at avoiding conflicts of national laws governing such aid to the benefit of in principle all EU citizens crossing the borders to attend education. EU students are EU citizens and it is simply hard to see why, in relation to student financial aid, they would deserve less coordination protection than workers enjoy as regards unemployment benefits or retired EU citizens in relation to old-age benefits. Further, a coordination regime for indirect student support in the form of family benefits exists. Why then does the same not hold true for student financial aid systems?

This contribution explores how national maintenance grant and loan systems can be coordinated in such a way that EU students are not faced with conflicts of student financial aid laws and are subject to the legislation of, in principle, one member state. The premise is that this should not be legislation of the host state but the legislation of the home state. Ideally, the home state should be regarded – in Regulation 883/2004 terms – as the competent one for student financial aid purposes. In other words, EU students should, by virtue of EU law, have a right to export maintenance aid from that state.

This is not an original proposition. There is both academic and political support for the view that the home state rather than the host state should be responsible for maintenance aid.[17] The reason for this is essentially twofold. First, from a more theoretical perspective, as products of the welfare state, student financial aid systems can be regarded as territorially organised systems based on membership of a 'solidarity community'.[18] That membership implies a duty to contribute to the financing of the systems and, the other side of the coin, a right to claim support. During their studies students may contribute to the economy in the host state, but they do not or hardly pay (direct) taxes out of the revenues by which student financial aid systems are funded. It simply does not make a lot of sense to regard EU students as 'members' of the

---

[13] Ibid, chapter 5.

[14] Case C-293/83 *Gravier* [1985] ECR 593.

[15] Case C-209/03 *Bidar* [2005] ECR I-169 [33]–[36].

[16] Article 48 TFEU.

[17] See eg H Skovgaard-Petersen, 'There and Back Again: Portability of Student Loans, Grants and Free Support in a Free Movement Perspective' [2013] *European Law Review* 783–804; G Davies, 'Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students not Previously Resident?' [2005] *Maastricht Journal of European and Comparative Law* 227–240 and M Dougan, 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?' [2005] *Common Market Law Review* 943–986.

[18] AP van der Mei, *Free Movement of Persons within the European Community – Cross-Border Access to Public Benefits* (Hart Publishing 2003) 5–10.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

solidarity community in the state where they study and to impose on that state responsibility for maintenance aid. It is far more logical to regard EU students as members of the solidarity circle in the member state where they live prior to commencement of a foreign study and to which they are most likely to return upon graduation. It is in the home state that parents before, and the students themselves often after, the studies will contribute to the financing of the systems.

Second, from a more practical perspective, offering EU students a right to maintenance aid in the host state would be financially dangerous. Especially the member states that award comparatively generous grants or loans to students would probably be faced with a huge inflow of foreign students, which may impose a high burden on their public finances and even affect their ability to keep up the systems. One may add that the costs of cross-border education itself are borne by the host states. EU law does not provide for a reimbursement scheme under which the host state is repaid all the costs of services offered to 'outsiders', comparable to the one developed for health care.[19] If the host state were obliged to pay for both the education and maintenance aid of EU students, it might turn into an educational magnet that might explode at a point not too far away in time. Looking at the outline of all costs, it would seem nothing but reasonable to divide the costs: the host state pays for education, the home state contributes to maintenance costs.

Given the widespread support for portability of maintenance aid, it is in fact remarkable that an EU right to export it has not yet been recognised. Of course, this could be explained by the member states' general preference to pursue the policy goal of encouraging student mobility within the framework of 'Bologna', free from the legal restraints imposed by EU law as interpreted by the Court of Justice. Yet, this can only be part of the explanation. Whether the member states like it or not, the right to study in other member states is a Treaty-based right and national rules restricting export of grants undeniably hamper the exercise of this right. What explains or justifies the conclusion that EU law does not impose 'any obligation' on the host state to award grants for studies abroad?

This contribution traces concrete objections that might exist against an EU right to export maintenance aid and considers whether, and if so how, these could possibly be overcome. More generally, the contribution reflects on how national student financial aid systems could be coordinated so as to do justice to the constitutional nature of the EU right to study in other member states. To be sure, the goal is not to present a fully fledged, comprehensive coordination regime for student financial aid. Rather, the present contribution may be looked at as a thinking exercise aimed at exploring the main principles on which such a system could be based.

[19] Ibid, chapter 4.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

II. ARGUMENTS AGAINST AN EU RIGHT TO EXPORT STUDENT FINANCIAL AID

For present purposes four arguments against an EU right to export student financial aid are identified. They concern the notion of portability itself (Section II.i), the question of who should be entitled to portable aid (Section II.ii), duplication of entitlements to such aid (Section II.iii) and the fear of 'student financial aid tourism' (Section II.iv).

II.i Portability

To begin with, it is worthwhile asking whether, in spite of the aforementioned general support for it, there are nonetheless objections to the notion of portability of maintenance aid as such. Are there any reasons why students who are born and have lived their entire life in the member state of their nationality should be denied maintenance aid solely because they choose to study in a member state other than their home state, and if so, what are those reasons?

A first answer one could think of concerns the fact that the costs of living in the host state may be higher than in the home state. Portability could increase the latter's expenditure and possibly affect the funding of its maintenance aid system. Clearly, this financial argument is not persuasive. Maintenance costs in the state of the study may just as likely be lower[20] and where they are higher, there simply is no obligation for member states to increase the amount granted. A possible right to export would merely imply that students are entitled to the same amount of aid as they receive when they study on national territory. Because of differences in living costs, recognition of a right to export aid will not increase expenditure[21] and, hence, to use terminology used in the case law on cross-border healthcare, cannot affect the 'financial stability' of national student financial aid systems.[22]

Drawing inspiration from that healthcare case law, one could perhaps also assert that a right to export student financial aid could undermine the home state's ability to maintain on national territory 'a balanced educational system open to all'.[23] Portability of grants could lead to an increase in the number of 'outgoing' students, which, in theory, could cause problems of overcapacity and waste of resources at home. In practice, however, such organisational or infrastructural problems are not so likely to occur, even in states that face a net outflow of students. Educational funding is usually, if not always, limited, classrooms and lecture halls are all too often overcrowded and many member states have the greatest difficulty in offering students adequate housing,

[20] An interesting question is whether a member state may lower the amount of grants where the costs of living in the state of the studies is lower than at home. Compare the discussion in the field of health care on the so-called '*Vanbraekel*-reimbursement', as discussed in AP van der Mei, 'Cross-Border Access to Healthcare and Entitlement to the Complementary "*Vanbraekel*-Reimbursement"' [2011] *European Law Review* 431–440.

[21] Case C-237/94 *O'Flynn* [1996] ECR I-2617 [29].

[22] Case C-120/95 *Decker* [1998] ECR I-1831 [39] and Case C-158/96 *Kohll* [1998] ECR I-1931 [41].

[23] Case C-158/96 *Kohll* [1998] ECR I-1931 [50]–[51].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

libraries and other facilities. Export of student financial aid, and the outward student mobility it stimulates, does not increase but decreases such capacity problems and thus rather enhances the quality and accessibility of the home state's educational system.[24]

From the healthcare case law[25] another, and at first glance seemingly more powerful, argument against portability can be deduced. It may be labelled as the 'autonomy argument' and runs as follows: because member states are wholly free to establish student financial aid systems or not, it should also be wholly up to them to decide for what kind of training or courses they wish to make available grants or loans. Member states should be entitled to refuse aid, for instance, for courses offered by private educational institutions, programmes that do not meet minimum quality standards or courses that do not lead to a degree giving access to a profession. For as long as member states do not make any distinction between education followed abroad and training at home, the choices made fall within their autonomy, as (to be) respected by EU law.

Perhaps one could counterclaim that one of the main added values of free movement of students is that it enables students to attend abroad courses or training that are not available at home and that this opportunity will remain *de facto* meaningless if is not facilitated by a right to portable aid. That may be true, but it does not alter the fact that the competence to decide for which courses to offer or not to offer aid is held by the member states. A national rule that excludes a given type of training from student financial aid eligibility regardless of where it is offered does not constitute a prohibited obstacle to freedom of movement. A right that does not exist at home cannot be exported abroad.

Nonetheless, in spite of its *prima facie* strength, it is submitted that this 'autonomy argument' does not constitute a genuine obstacle to recognising a right to export as such. In essence, it only applies to certain courses and training programmes. The bulk of courses are offered under the umbrella of public educational systems and subject to the EU rules on diploma recognition, which, crudely simplified, prescribe that diplomas obtained in one member state must be recognised in other member states for purposes of admission to a profession. The argument in question may perhaps justify certain limitations on the material scope of the right to export, but it does explain why the right cannot be recognised as such.[26]

---

[24] One could perhaps counterclaim that portability and the increase in cross-border student mobility it triggers may cause or increase capacity problems in the host state and limit the accessibility of education for students there. This may be true, but it is hard to see why these problems could justify non-portability of grants. The problems concerned are to be handled by the host state. Compare Case C-73/08 *Bressol* [2010] ECR I-2735.

[25] Case C-157/99 *Geraets-Smits and Peerbooms* [2001] ECR I-5473 [86] and Article 7(1) of Directive 2011/24/EU of the European Parliament and of the Council of 9 March 2011 on the application of patients' rights in cross-border healthcare [2011] OJ L 88.

[26] Directive 2005/36/EC of the European Parliament and of the Council of 7 September 2005 on the recognition of professional qualifications [2005] OJ L 255. In his opinion in *Fahmi*, A-G Alber held that study finance is 'primarily intended to enable' students 'to gain the qualification required to pursue certain occupations' and that it is therefore justified to finance 'only those studies which meet certain quality criteria'. Because 'the diplomas awarded upon completion of studies have not yet been fully harmonised in the European Union', a member state would, in

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

A final reason why a right to export aid may be regarded as problematic results from evolving views on the aim or nature of student financial aid. Student financial aid is no longer only seen as a tool for making education financially accessible for the financially less privileged. Nowadays, it is also looked at and used as an instrument for investing in the national labour market, economy or society. Thus, by making aid portable, and thus giving students an incentive to study abroad, states often wish to ensure that students, upon graduation, will work in and use the skills and knowledge they acquired during their studies to the benefit of their economies and labour markets rather than those of other member states.

This 'investment argument' does have strength but it does not constitute an argument against portability of aid as such. First, portability may very well serve – and many member states indeed often see it – as a tool for local investment: it enables students to obtain skills or knowledge they cannot obtain at home and that they can use upon graduation to the benefit of the national economy or labour market. In fact, because the costs of education itself are borne by the host state and, as a rule, will exceed the amounts that the home state would have to spend on maintenance aid, portable aid can be seen as a comparatively cheap instrument for enriching local economies.

Second, in order to avoid member states investing in the economy of another member state rather than their own, there is no need to exclude portable aid altogether. To ensure an investment return, it may suffice to award portable aid only to students who are likely to return upon graduation. This is indeed how member states look at it in practice. The policies of states that have introduced portable aid systems are usually based on a (rough) distinction between resident students and non-resident students. The former are expected or assumed to return upon completion of their studies and member states thus consider it 'safe' to give them portable aid. The latter are expected to work in other member states and, hence, are (to be) denied portable aid. In other words, the investment argument does not so much oppose portability itself but rather calls for restrictions on its personal scope.

All in all, no fundamental objections to portability itself would seem to exist. There may be sound reasons to allow member states to impose certain limitations on the material or personal scope of portable aid but not to permit them, as EU law now does, to deny a right to export altogether.

II.ii The Member States' Duty to Award Portable Aid to Non-resident Workers and Dependent Family Members

Looking at national practice and debates on the issue, it would seem that the main controversies (indeed) have to do with the question to which students' member states must award portable aid and which ones they are permitted to exclude.

---

the view of the A-G, be entitled to deny aid for foreign studies that do not lead to a diploma that upon return home is automatically recognised. Opinion in Case C-33/99 *Fahmi* [2000] ECR I-562. This is not wholly persuasive. In situations where there is no automatic recognition, the student in question may still do an aptitude test or be admitted after an adaptation period, which s/he may very well pass. It is hard to see why this should be a ground for denying portability altogether.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

Member states' natural tendency is to only grant portable aid to students who prior to their foreign studies have lived (for a minimum period) on national territory (hereafter: resident students).[27] It is only such students who are considered to be members of the national solidarity community and who are expected to return home upon graduation. If member states were entirely free to apply (durational) residence requirements, and thus could exclude non-resident students, much of the opposition to a possible EU right to export probably would not exist. The problem, however, is that member states are not wholly at liberty to do so. EU law restricts member states' power to exclude non-residents.

This does not so much concern the EU rules governing free movement of students. Recent rulings, such as the one in *Prinz and Seeberger*,[28] demonstrate that member states may reserve portable aid only to students who have demonstrated a certain degree of integration into their society. In order to establish such a degree of integration, or such a 'genuine link',[29] member states cannot apply a single criterion such as residence (for a minimum period of time) on national territory, and automatically exclude all those who do not satisfy it from entitlement to aid. All relevant factors, including family links, past residence, nationality, employment, and language skills, must be taken into consideration. Nonetheless, residence would seem to be the most relevant of all these elements. As the place where a person's 'habitual centre of … interests is found',[30] residence probably says much more about a student's connection or link to a given state or society than other factors do. For students who do habitually reside on national territory prior to their studies it will, as a rule, be quite easy to establish the required 'genuine link', whilst this is probably far more difficult for non-residents. Phrased differently, and perhaps somewhat oversimplified, the case law on free movement of students would seem to permit member states to do what they want: to reserve portable aid for resident students to the exclusion of non-resident students.

The problem at hand is rather caused by case law on free movement of workers. Article 7(2) of Regulation 492/2011[31] (formerly Regulation 1612/68[32]) confers upon workers a right to equal treatment in relation to 'social advantages', including study grants and loans.[33] Since the 1970s, the Court has construed this provision broadly. It has extended the right at hand to dependent family members of workers.[34] Further, workers and family members may rely on Article 7(2) to claim student financial aid also when they live abroad and wish to study in another member state, including the one in which they (already) reside.[35] The progressive case law culminated in the 1999

---

27 Lam et al, *supra* note 12, at 51–52.

28 Joined Cases C-523/11 and C-585/11 *Prinz and Seeberger* [2013] ECR I-0000.

29 C-209/03 *Bidar* [2005] ECR I-169 [63].

30 Case C-90/97 *Swaddling* [1999] ECR I-1075 [29].

31 Regulation (EU) No 492/2011 of the European Parliament and of the Council of 5 April 2011 on freedom of movement for workers within the Union [2011] OJ L 141, 1.

32 Regulation no 1612/68 of the Council of 15 October 1968 on freedom of movement for workers within the Community [1968] OJ II. 475.

33 Case 39/86 *Lair* [1988] ECR 3161 [21]–[22].

34 Case 316/85 *Lebon* [1987] ECR 2811 [13].

35 Case C-308/89 *di Leo* [1990] ECR I-4185 [13]–[16].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

ruling in *Meeussen*,[36] in which the Court concluded that a Belgian student who studied and lived with her parents in Belgium could claim maintenance aid in the Netherlands just because her parents worked there and Dutch students were entitled to financial aid for the same education in Belgium.

In essence, in interpreting Article 7(2) the Court told member states that if they decide to introduce portable aid programmes, they must include workers and their children residing outside their national territory. Phrased differently, for students, possession of the privileged status of worker or child of a worker sufficed for entitlement to maintenance aid, regardless of their place of residence.

This '*Meeussen* case law' triggered opposition from member states, which feared the financial consequences, argued that they should not be obliged to offer aid to non-resident students studying abroad and, thence, insisted on their power to make entitlement to portable aid conditional upon (durational) residence requirements. In more recent case law, and the rulings in *Commission v the Netherlands*[37] and *Giersch*[38] in particular, the Court showed sympathy for the position of the(se) member states and the above-discussed 'investment view' on portable aid in particular. While it denied that budgetary reasons can justify (durational) residence requirements for entitlement to portable aid, the Court did accept that (i) member states may seek to increase the proportion of residents who hold (higher) education degrees so as to promote the development of their national economy, (ii) they may for this purpose reserve portable aid for students who have demonstrated a certain degree of integration in their society and (iii) (durational) residence requirements may be regarded as an appropriate tool for establishing such a 'genuine link'.[39]

In the end, the Court did not accept the (durational) residence requirements under review. The core of the Court's reasoning concerned the chances of students returning home upon graduation. Residence on national territory prior to foreign studies may say something about the probability of graduates returning home and contributing to national economic development, but, so the Court opined, it is not the only relevant factor. Other elements may be relevant too, and must be taken into consideration, such as the fact that students may reside alone or with the parent-worker in a neighbouring member state or that the latter may have worked and lived for a significant period of time near the state of employment.[40]

In other words, member states may make entitlement to portable aid conditional upon fulfilment of (durational) residence requirements, but they must give students who do not satisfy these the opportunity to rebut the presumption that they are not sufficiently integrated and/or unlikely to work on national territory upon graduation.

Thus, in *Commission v the Netherlands* and *Giersch* the Court had more of an eye on member states' interests than it had in *Meeussen*: member states are no longer obliged to offer non-resident students portable aid just because they hold the status of worker or family member. At the same, however, it is clear that the Court has not taken away all

---

36 Case C-337/97 *Meeussen* [1999] ECR I-3289 [23].
37 Case C-542/09 *Commission v the Netherlands* nyr.
38 Case C-20/12 *Giersch* nyr.
39 Ibid [56] and [68].
40 Ibid [78].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

concerns about portable aid: member states may still be obliged to award such aid to such non-residents, especially, as the Court seems to say, to those living in neighbouring states.

II.iii Overlapping Entitlements to Student Financial Aid

The Article 7(2) case law has triggered two additional arguments against a possible EU right to export maintenance aid. The first concerns the 'risk of duplication with equivalent financial aid paid in the Member State in which the student resides'.[41] This problem already exists and may increase if an EU right to export were to be introduced. It may be illustrated by the following example.

A student lives and studies in member state A. Her father works in member state B, her mother in member state C. By virtue of residence, the student is entitled to financial support in member state A. If the legislation of neither member state B nor member state C provides for portability, there only exists a right to financial support in member state A. A situation of overlap in claims would arise if member state B were to decide to introduce a right to export student financial aid. As a resident the student may be entitled to aid in member state A and, as a family member of a worker, she can rely in member state B on Article 7(2) of Regulation 492/2011 and possibly claim aid there too. If EU law were to prescribe the portability of aid, the problem would expand: the student might be entitled to financial support in member states A, B and C.

The question can be raised whether multiple claims to student financial aid are actually problematic. In fact, one might ask whether students should perhaps not have the right to claim aid in more than one member state. Study grants rarely cover all costs. Multiple claims to aid could decrease financial obstacles to cross-border student mobility. One might even speak of a desirable shared financial solidarity. Nonetheless, multiple claims are (considered to be) problematic, especially where or to the extent that the amounts involved overlap. If in the above example both member state A and member state B offer grants in the amount of €200, the student might be entitled to a total of €400. This may please the students but is problematic because it runs counter to the legitimate policy choice of each of the two member states that students will receive only €200 and will have to bear the remaining costs themselves.

The Court has suggested that the problem of overlap can be avoided if a member state offering portable aid would take into account the amount of aid the student receives from or in the state of residence.[42] This, it is submitted, does not entirely hold true. National anti-cumulation rules that suspend, or decrease, national entitlements to aid when, or in so far as, the students involved can claim grants or loans in another member state may decrease but cannot entirely eliminate problems of overlap. The core issue is that no clarity exists as to which member state is primarily responsible for student financial aid and which member state is permitted to suspend or decrease grants or loans. In the above example member state A may apply its own anti-cumulation rules and deduct from the amount of its grants the amount the student is entitled to in member state B: €200 – €200 = €0. Member state B, however, may reason and act

[41] Case C-20/12 *Giersch* nyr.
[42] Ibid.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

similarly. The danger thus exists that the student is sent from pillar to post and may not receive anything: €0 + €0 = €0.

At first glance, multiple claims to student financial aid seem less problematic in so far as the amounts granted do not entirely overlap. In fact, double or triple claims may even be regarded as desirable. Assume that in the above example, member state A awards €200 and member state B €300. Viewed from the classic perspective that the exercise of free movement rights should not lead to a loss of social benefits, the student should not be left with less than €300. A problem, however, arises: how should the responsibilities be divided between member state A and member state B? One option could be to only recognise a right to student financial aid in member state B. Yet, why should the entire burden be placed on this member state? Is it not much more logical or fair to divide the burden over the two member states? National anti-cumulation rules do not produce the desired outcome. Member state A may simply deduct the €300 the student is entitled to in member state B and again offer nothing. Member state B may reason that it will only pay €300 – €200 = €100, which is less than the 'ideal' outcome of €300.

II.iv Student Financial Aid Tourism

The second argument against an EU right to export maintenance aid triggered by the case law on Article 7(2) of Regulation 492/2011 concerns the risk of 'student financial aid tourism'.[43] EU citizens, or their children, who are not entitled to aid or only to small grants or loans in the state where they live, may take up employment in another member state, acquire the status of worker there and, by doing so, acquire for both themselves and their dependent children the right to claim (higher) portable grants or loans for studies in the state of residence. One may add that even where the parent-worker resigns and leaves the state of employment, the children cannot only retain their right of residence for the time necessary to complete their education[44] but, for that period, also their right to claim student financial aid.[45] EU free movement law, so member states often reason, should not be construed to enable citizens to shop around for benefits that are not available at home or that are more generous than those available at home.

The argument rests on some implicit premises. First, it suggests that the EU citizens concerned abuse their free movement rights. This, however, is not the case. Such EU citizens do not have the 'intention to obtain an improper advantage from the EU rules by artificially creating the conditions laid down for obtaining it'.[46] They just make use of rights granted to them by EU law.

---

[43] Case C-20/12 *Giersch*, ECLI:EU:C:2013:411 [80].

[44] Article 12(3) of Directive 2004/38 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158; Article 10 of Regulation 492/2011, Case C-310/08 *Ibrahim* [2010] ECR I-1065 [50] and Case C-413/99 *Baumbast* [2002] ECR I-7091 [63].

[45] Joined Cases 389/87 and 390/87 *Echternach and Moritz* [1989] ECR 723 [36].

[46] Joined Cases C-58/13 and C-59/12 *Torresi*, ECLI:EU:C:2014:2088 [46].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

Second, the argument suggests that EU law has no eye on member states' concerns about 'benefit tourism' and its potential financial implications. Again, this is not the case. The Court has permitted the member states to protect themselves against benefits tourism by denying student financial aid (and other social advantages) to EU citizens who are only performing 'marginal and ancillary' activities.[47] Member states are only obliged to grant maintenance aid to nationals of other member states who perform 'effective and genuine' activities, which implies 10 up to 15 working hours a week.[48]

One could perhaps assert that this threshold of 10 up to 15 hours' work a week is not high enough to actually prevent benefit tourism. In fact, the Court recently suggested this when it held in *Giersch* that member states may make entitlement to student financial aid conditional on not only the requirement of effective and genuine work but also on fulfilment of a minimum period of employment in order to avoid 'the risk of study grant forum shopping' and to ensure that a frontier worker 'who is a taxpayer and who makes social security contributions' has a sufficient link with the state of employment.[49]

This observation is curious. It is hard to compare with previous case law in which the Court had opposed durational employment (or residence) requirements and rather had held that EU workers and their families are entitled to equal treatment in relation to social advantages from the moment they take up employment (or establish residence).[50] Further, the host state is in principle free to tax the worker from the day of first arrival and it is hard to see why effective and genuine work of 10 up to 15 hours a week does not provide a sufficient link with the host member states' society. There are simply no signs, let alone evidence, that the number of EU citizens who have taken up small jobs in other member states with a view to becoming entitled to study grants or loans is so large that it actually imposes a significant financial burden on the host member states.

Of course, some member states, like Luxembourg, may have a high number of frontier workers, whose children live and study in neighbouring member states. However, the vast majority of these employed persons will perform effective and genuine work and not have chosen to work in Luxembourg for reasons related to student financial aid. One can understand why a member state like Luxembourg is concerned about 'their' students not coming home upon completion of their studies or the fact that such students may also be entitled to aid in the state of their residence. It

---

[47] Case 53/81 *Levin* [1983] 1035 [21].

[48] Case C-14/09 *Genc* [2010] I-931.

[49] Case C-20/12 *Giersch* nyr [80]. The Court further held that, 'in another context', Article 24(2) of Directive 2004/38 permits the exclusion of economically inactive Union citizens from their maintenance aid systems for as long as they have not yet acquired the right of permanent residence. In response to this the Luxembourg legislator indeed decided to alter its rules so as make entitlement to aid conditional upon five years of employment on Luxembourg territory. Loi du 24 juillet 2014 concernant l'aide financière de l'Etat pour études supérieures, Memorial, Journal Officiel du Grand-Duché de Luxembourg, A – No 139, 31 Juillet 2014. See further F Simans, *La nouvelle loi sur les aides financières: nouvelle maladresse du Gouvernement?* available at http://luxlegal.wordpress.com/2013/08/02/la-nouvelle-loi-sur-les-aides-financieres-nouvelle-maladresse-du-gouvernement.

[50] Case 39/86 *Lair* [1988] ECR 3161 [21]–[22] and Case C-111/91 *Commission v Luxembourg* [1993] ECR I-817 [18].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

is less clear, however, what additional problems student financial aid tourism would cause. In fact, the argument in question is quite unarticulated. It is far from obvious why member states, as *Giersch* suggests, would need the power to apply, in addition to the threshold requirement of effective and genuine work, durational employment requirements.

II.v Interim Conclusion

To recapitulate, the reason why EU law does not provide for a right to export maintenance does not so much lie in the notion of portability itself. In fact, many member states favour portability, which they tend to see both as a tool to make education accessible and to enrich their local labour market and economies. The problem is above all that Article 7(2) of Regulation 492/2011 obliges member states to extend aid for studies in other member states to non-resident workers and their children. This is and remains controversial, especially because these non-residents may not return home upon graduation. Member states may be hesitant to invest in portable aid as it may not generate the desired return.[51] In addition, because non-resident workers and children may very well have a claim to student financial aid in the state of residence, portable aid may cause an undesirable duplication of entitlement to aid. These problems already exist but could be aggravated if it were no longer up to the member states to decide on making aid portable but if EU law obliged them to do so.

III. TOWARDS AN EU RIGHT TO EXPORT STUDENT FINANCIAL AID

So, in light of the above, how could the EU possibly move towards a right to export student financial aid or, more generally, coordinate student financial aid systems in a way that does justice to the constitutional nature of EU citizens' right to study in other member states?

This section seeks to answer that question by reconsidering the duty imposed on member states by Article 7(2) of Regulation 492/2011 to extend portable aid to non-resident workers and children (III.i.), exploring whether EU law allows or should allow member states to take measures aimed at inciting recipients of portable aid to return home upon graduation (III.ii.) and how the problem of overlap could possibly be tackled (III.iii.).

[51] Member states thus may be inclined to limit their expenditures on portable aid. For example, in response to the ruling in *Commission v the Netherlands*, the Dutch government decided to simply abolish the durational residence requirement for frontier workers and non-resident family members altogether and to include them in its portable aid programme. However, to protect its public purse, it also decided to limit the overall budget available for the portable aid programme, *Staatscourant* [2013] [180].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

III.i Reconsidering the Duty to Award Portable Aid to Non-resident Workers and Children

The main arguments against a possible EU right to export maintenance aid result from the case law on Article 7(2) of Regulation 492/2011. If the duty to extend aid for studies in other member states to non-resident workers and children were eliminated, much of the opposition to an EU right to portability would probably fade away. So, for present purposes, it is useful to analyse why the Court has imposed the duty on the member states. Why do or should non-resident workers and children actually have a right to portable aid in the state of employment?

From the case law one can distil two possible justifications for the right to social advantages, including student financial aid. First, the right helps workers and their dependent family members to integrate in the economic and social life in the state of employment.[52] Second, integration in, or having a sufficient link with, the state of employment may also be a ground for entitlement to 'social advantages'. By participating in the labour market and paying taxes in the state of employment, workers create a link with the society of that state and, as the Court has held, they therefore cannot be denied the benefits of Article 7(2).[53]

In light of the above, one can understand why workers and workers' children residing in the member state of employment (ought to) have a right to student financial aid, also when they study in another member state. One can also comprehend why frontier workers have a claim to portable aid in the state of employment: they make their tax contributions there and such aid enables them to acquire abroad skills or knowledge that may help them to further or better integrate in the labour market in which they are already active.

It is less obvious, however, why (frontier) workers' non-resident children should be entitled to portable maintenance aid in the state of employment. They neither live nor study in that state and, upon graduation, the 'first instinct'[54] of such children may be to work in the state where they already live and have completed their studies. They probably will integrate and make tax contributions in that state rather than in the state where the parent works.

One may argue that non-resident children's right to portable aid in the state of employment constitutes a *juste retour* for the economic and tax contributions the parent-worker makes in the state of employment. The parent-worker is a contributing member of that state's welfare community and, hence, the children' right to portable aid ultimately benefits him or her, especially when aid is offered in the form of grants.

As such, this reasoning makes sense. According to the '*Lebon* case law',[55] children can rely on Article 7(2) of Regulation 492/2011 only when and because they are dependent on the worker. For children the right to social advantages is a derived right that they only enjoy because the worker benefits from this. This certainly holds true as regards benefits that are meant to, or actually do, compensate for family expenses. As

---

[52] Case 76/72 *Scutari* [1973] ECR 46.
[53] Case C-20/12 *Giersch* nyr [63] and Case C-379/11 *Caves Krier Frères* nyr [53].
[54] Case C-542/09 *Commission v the Netherlands*, nyr [76].
[55] Case 316/85 *Lebon* [1987] ECR 2811.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

regards student financial aid, the benefit for the worker is less obvious. In many states, such support is granted to students as autonomous and independent young adults and is meant to facilitate access to education regardless of their parents' financial ability or willingness to contribute financially.[56] Why would students, in their capacity of a dependent of a worker, be entitled to a benefit meant rather to make them independent from the parent-worker? When student financial aid is means tested, so when it is only made available for students whose parents lack sufficient financial means, how does the parent-worker benefit financially? Where aid is offered in the form of loans, which students themselves must pay back upon graduation, what is the advantage for the parent-worker?

In *Giersch* the Court seemed to implicitly recognise that neither one of the two aforementioned classic justifications for entitlement to social advantages can persuasively explain non-resident children's claim to portable aid in the parent's state of employment. The Court offered another explanation: children of (frontier) workers who reside in a neighbouring member state may have a certain attachment to the state of employment, which may incite them to work there upon graduation.[57] Question marks can be placed here. No doubt, because of that attachment, children of workers may be more inclined to work in the state of employment than other non-resident students. Yet, their first instinct still will be to study in the state of residence. In the view of the Court, this 'proximity link' is a sufficient basis for the right to claim portable aid in the state of employment. One may very well disagree and take the view that this link constitutes a quite weak foundation for the right under consideration.

In light of the above, the argument could be made that the right to claim aid in the state of employment for studies in other member states could be sacrificed, especially as regards non-resident children of workers studying in the state of their residence, so as to clear the ground for an EU right to export aid.

III.ii Measures Aimed at Graduates Returning Home

In the alternative, if it is assumed that the duty imposed by Article 7(2) of Regulation 492/2011 is here to stay, at least for the time being, discussion on a possible EU right to export student financial aid must address the concrete obstacles, as identified in the previous section. The main obstacle concerns the argument that member states may not be able to harvest the fruits of their investment in portable aid granted to non-resident workers and children.

One could brush aside the member states' concerns about this altogether and reason that the 'knowledge acquired by a student in the course of his higher education does not in general assign him to a particular geographical market'.[58] Also, one may side with A-G Jacobs, who once observed that member states not only benefit from public investment they make in education directly because graduates will enter their national

[56] Compare F De Witte, 'Who Funds the Mobile Student? Shedding some Light on the Normative Assumptions Underlying EU Free Movement Law: Commission v Netherlands' (2013) 50(1) *Common Market Law Review* 203–215.

[57] Case C-20/12 *Giersch* nyr [78].

[58] Case C-367/11 *Prete* nyr [45].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

employment market, but also 'indirectly, because of the benefits arising to the EU as a whole'.[59] This may be true but it is not how most member states tend to look at it in practice. They do wish graduates to return and, if there is not some guarantee that this will happen, member states probably remain hesitant to accept an EU right to portability.

In theory, this concern could easily be accommodated by national rules that would make entitlement to maintenance aid for studies in other member states conditional upon a (statutory or contractual) duty to return home to work (for a certain period of time). It is safe to assume, however, that EU law does not allow for such a duty as *de facto* it comes close to a (temporary) denial of the right of Union citizens to choose where to work within the Union, as guaranteed by Article 45 TFEU. The same could be said about less rigid measures which do not oblige but merely encourage students to return. Notably, however, it appears that the Court is not as opposed to such measures as one might have expected. In *Giersch* it held that member states may pursue the goal of promoting the number of residents holding higher education degrees by a system of financing which makes the grant of a loan, or the outstanding balance thereof, or its non-reimbursement, conditional on the student returning home upon completion of his or her studies abroad.[60]

This observation is curious. As noted earlier on, so far member states have mainly sought to encourage students to return by applying residence criteria, which may suffice to guarantee an investment return. Member states have not opted, at least not structurally, for 'homecoming requirements'[61] such as the ones suggested by the Court. Indirectly, then, the Court seems to invite member states to adopt measures that may help to encourage student mobility but affront the hard core of Article 45 TFEU.[62] Whether or not the Court, if it were directly asked, would actually be willing to accept such measures remains to be seen, but hopefully it would not do so. To pave the way for an EU right to export student financial aid some limitations on free movement of workers may be necessary, but the least restrictive ones should ideally be chosen. Referring to what has been said in the previous sub-section, the option to deny non-resident children a right to portable aid only minimally impacts on their parents'

---

[59] Opinion in Case C-147/03 *Commission v Austria* [2005] ECR I-5969 [39] (upon graduation students 'become crucial actors in disseminating and spreading their acquired knowledge throughout the EU, in contributing to the integration of the European employment market and, ultimately, when assessed in the light of the goals inspiring the EC Treaty, in promoting the "ever closer union". In view of the overall benefits to the EU that they produce, the public investment made in the education of … students will provide a return to the host State, either directly, because the students subsequently enter its employment market, or indirectly, because of the benefits arising to the EU as a whole').

[60] Ibid [79].

[61] S O'Leary, 'The Curious Case of Frontier Workers and Study Finance: *Giersch* – Case C-20/12, *Elodie Giersch* v *État du Grand-Duché de Luxembourg*, Judgment of the Court of Justice (Fifth chamber) of 20 June 2013, nyr' (2014) 51 *Common Market Law Review* 601–622, at 615.

[62] Ibid ('Unfortunately, a homecoming requirement of the type proposed in *Giersch* may not necessarily be limited to a small Member State like Luxembourg').

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

right to work in other member states. Therefore, that option is to be preferred above homecoming requirements, which directly target that same right of children.

III.iii Solving the Problem of Overlap

In debates on export of student financial aid, the problem of overlap so far has not played an equally important role as the issue of graduates returning home has. However, the problem does exist and may become more pressing if an EU right to export were actually placed on the agenda.

As stated earlier,[63] the Court has suggested that this problem could be remedied if one member state (e.g. the state of employment) were to apply its national anti-cumulation rules and deduct from the aid it would normally award the amount that the student in question is entitled to in another member state (e.g. the state of residence).[64] This, however, is not necessarily the case. The latter member state may do the same, as a result of which the student concerned may be left empty handed.

The core of the problem is that EU law, as it stands today, does not demarcate the responsibilities of the member states involved. In order to see how EU law could possibly do so, it is useful to take a brief look at Regulation 883/2004, and its coordination rules for family benefits in particular. These rules are based on the principle that beneficiaries are entitled to family benefits also when they or the children live in another member state.[65] In other words, family benefits are exportable. In order to avoid overlap of entitlements to family benefits in different member states, Regulation 883/2004 provides two types of conflict rules.

The first type governs situations in which a person, if it were for national law alone, would be entitled to family benefits for the same child for the same period in more than one member state. Such overlap is avoided by the general rules determining the applicable legislation, which designate either the member state of (self)-employment[66] (*lex loci laboris*) or the state of residence[67] (*lex loci domilicii*) as the competent state and order this state to apply its legislation. A member state that is not designated as the competent one does not have to award family benefits.[68]

The second type of conflict rules concerns the 'priority rules in the event of overlapping'. These rules regulate situations in which there is more than one competent state, for example, where a parent is simultaneously (self-)employed in more than one member state or where each of the parents is entitled to child benefits in a different member state. The rules give priority to one member state and order this state to award benefits.[69] The other member state is, if its student financial aid laws are more generous

---

[63] Section II.iii.

[64] Case C-20/12 *Giersch* nyr [79].

[65] Article 67 Regulation 883/2004.

[66] Article 11(3)a Regulation 883/2004.

[67] Article 11(3)e Regulation; Article 68(1)a Regulation 883/2004.

[68] Case C-394/13 *B* nyr [28].

[69] Priority is determined as follows. First, if one parent is entitled to benefits by virtue of economic activity, and the other on the basis of residence, the former benefits are given priority. Article 68(1)a Regulation 83/2004. Second, if both parents are entitled to benefits on the same

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

than those of the state having priority, obliged to pay a supplement consisting of the difference in the respective amounts.[70]

For present purposes, some useful lessons can be learnt from these coordination rules for family benefits.[71] First, recognition of an EU right to export maintenance aid requires the prior determination of the state in which that right should exist. In Regulation 883/2004 terms, there is a need to first establish which member state must be regarded as the competent one or, perhaps, which one must be given priority before the other. Second, to avoid actual overlap the duties of the state not giving competence or priority must be defined.

As student financial aid is granted directly to students themselves, it is their position that should serve as the starting point for determining the competent state. As observed in the Introduction, the current rules on free movement of students leave a negative conflict of laws unresolved and this conflict could best be settled by making not the host state (the member state where they attend education) but the home state (the member state where the students reside prior to commencement of the studies) the competent one. The case law on free movement of workers rather creates a positive conflict of laws. Given the fact that a worker contributes to the labour market, economy and the public finances in the state of employment, it seems most logical to choose the state of employment as the competent one for student financial aid, even if the worker lives or studies in another member state.

So, one could opt for the following rules: (i) a student who does not work during the studies is subject to the legislation of the member states where s/he resided prior to the studies and (ii) a student who does work while in school or university is referred to the state of employment. Hence, a student who takes up employment in the state of the studies faces a change in the applicable legislation.

More difficult and delicate issues arise when the parents are taken into consideration. If a parent takes up employment in another member state, should there also be a change in the applicable rules? Where the child either lives in or studies in that other member state, much can be said for this. After all, the parent-worker makes economic and financial contributions in that state, student financial aid facilitates the child's integration in that state's society and either because of residence or the studies in that state the child may very well decide to work there upon graduation.

As observed earlier on, however, this reasoning does not entirely extend to children who do not join the parent-worker in the state of employment and rather stay home and study there. Such children have a far closer link with the member state of residence and education than with the member state in which the parent works, and the former state is more likely to benefit from students' education after graduation than the latter.

---

basis (so economic activity or residence), priority is given to the state where the children reside. Article 68(1)(b)i and iii Regulation 883/2004.

[70] Article 68(2) Regulation 883/2004.

[71] These rules cannot be applied as such to student financial aid, which, as one may assume, does not constitute a 'family benefit' as it is not a benefit 'intended to meet family expenses' (Article 1(z) Regulation 883/2004). Compare Opinion of A-G Alber in Case C-33/99 *Fahmi* [2001] ECR I-562 [45]–[46] and Opinion of A-G Jacobs in C-43/99 *Leclere* [2011] ECR I-4265 [50].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

So, it would make sense to make an exception to the above suggested rules for determining the competent state for student financial aid: a student who lives and studies in a member state other than the one where a parent works is subject to the legislation of the former member state. In the alternative, one may hold on to the suggested rules, and thus regard both the state of the students' residence and the state of the parents' employment as competent, and establish that the former state must be given priority over the latter.

Choosing one member state as the competent state or the one having priority is crucial for, but does not suffice for, solving problems concerning multiple entitlements to aid and overlap. As the coordination rules for family benefits show, this also requires a proper definition of the role to be played by the non-competent state or the one that does not have priority. A distinction is to be made between two situations.

The first is when the non-competent state or the one not giving priority offers a lower amount in aid than the competent state or the member state having priority does. There is no problem. The latter state offers the aid, for the student there is nothing extra to be gained from the other state.

The second situation is the reverse one in which the non-competent state or the one not having priority offers more. Drawing inspiration from the rules on family benefits, three options could be considered in relation to the role of this member state: it could be prohibited, allowed or ordered to apply its legislation.

Until not too long ago, the first option was assumed to apply to family benefits. The rules determining the applicable legislation produce exclusive effect, which implies that the competent state must apply its legislation and that the non-competent state is precluded from applying its rules.[72] Translated to student financial aid, this would imply that the non-competent state is not entitled to award a supplement consisting of the difference between its own amount and the lower amount in the competent state.

In more recent case law on family benefits the Court has partially moved away from the strict prohibitive effect of the rules determining the applicable legislation and held that these rules do allow a non-competent state to grant benefits if there are specific and particularly close connecting factors between the territory of that state and the situation at issue,[73] such as residence[74] or the performing of economic activities[75] on national territory. This conclusion, so it would seem, can be extended to student financial aid: there is no rule of EU law that prevents a non-competent state from applying its student financial aid laws to a given student and, to avoid overlap, apply its anti-cumulation rules.[76] In other words, if this second option were chosen, the student in question would be entitled to maintenance aid in the competent state and be entitled to a differential supplement in the non-competent state.

---

[72] Case 302/84 *ten Holder* [1986] ECR 1821.

[73] Case C-394/13 *B* nyr [28].

[74] Case C-352/06 *Bosmann* [2008] ECR I-3827.

[75] Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, nyr.

[76] In light of the Court's family benefit ruling in *Hudzinski and Wawrzyniak*, one could assert that a member state is not permitted to deny aid altogether on the ground that the student concerned is also entitled to aid in another member state. Joined Cases C-611/10 and C-612/10 *Hudzinski and Wawrzyniak*, nyr [85].

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

The third option suggested above originates from the priority rules in the event of overlapping of Regulation 883/3004 for family benefits. The main difference from the second option is that the non-competent state or the one not giving priority is not allowed but obliged to pay a differential supplement in student financial aid.

For present purposes, each of the three options is worth considering. They all may help to avoid unwarranted overlap in entitlements to student financial aid and they all may reduce resistance to export of such aid. As noted more than once, the main obstacle to portability concerns the fact that a member state is obliged to grant aid to non-resident children of workers, even though these children may also be entitled to aid in the state where they live and study. If, however, the prime responsibility for student financial aid for such children is imposed on the state of residence and the state where the parent-worker is employed is no longer obliged to grant aid at all or only a supplement, (financial) objections to portable aid may decrease.

Of the three options, the second and especially the third seem, at first glance, the most appealing. They prevent overlap, (may) guarantee that students do not lose moneys they are entitled to on the basis of national law and seem to provide a fair division of the financial burden between the member states. Some caution, however, is warranted. The notion of a differential supplement does not necessarily provide ideal outcomes. For example, consider the following situation. A parent works in member state A and the child lives and studies in neighbouring member state B. Member state A has chosen to offer aid to students regardless of the parents' income. Member state B has opted for a means-tested aid system. The supplement to be paid by member state A depends on the amount awarded in member state B. If a student is, because of the parents' high income, not entitled to aid in member state B, member state A may have to grant its aid in full. Member state B may be inclined to make its means test stricter or even abolish its aid schemes altogether. If it were to act accordingly, member state B would shift part of or the entire financial burden onto member state A. In response, member state A, faced as it is with an increase in expenditures, may feel forced to either lower the amounts it grants or to also consider a means-tested aid system.

No doubt, more alternatives could be considered to solve the problem of overlap. Whatever solution is deemed the best or preferable, however, it is submitted that the key to it should consist of a combination of establishing the state that must assume first responsibility and a proper definition of the role of or duties imposed on the other state.

IV. CONCLUSION

Ever since the 1985 landmark ruling in *Gravier*[77] we know that the right to study in other member states is a right that nationals of the member states enjoy as European citizens. It is a right equal in constitutional rank as the right to work in other member states. Hence, more than a quarter of a century later, one might perhaps have expected that the EU institutions by now would have developed, or at least started working on, a set of rules coordinating student financial aid systems in a manner comparable to the coordination regime established for social security. This, however, is not the case. EU

[77] Case C-293/83 *Gravier* [1985] ECR 593.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

students may fall between two stools: they have no EU claim to maintenance aid, either in the host state or in the home state.

This chapter started from the premise that this gap in financial protection should ideally be filled by an EU right to export maintenance aid from the member state where they live prior to commencement of their studies, and explored the possible objections to recognising such a right or the hurdles to overcome. The obstacles do not lie in the notion of portability of maintenance aid or in the EU rules on free movement of students. Instead, the problems are caused by the case law on free movement of workers, and Article 7(2) on social advantages in particular. That case law imposes a duty on member states to extend maintenance aid to workers and children of workers, even when they live and wish to study in another member state. This duty is problematic. Member states oppose it as they see it as an EU-imposed duty to invest in students who upon graduation may not return to enrich the national society or inject wealth into the national economy and who might also be entitled to aid in the state where they live and study.

The obstacles to an EU right to export maintenance aid are preferably not to be overcome by 'homecoming requirements', which directly or indirectly oblige recipients to return home upon graduation and are an affront to Union citizens' right to choose the place where they wish to work, as guaranteed by Article 45 TFEU. Rather, it would seem preferable to solve the negative and positive conflicts of student financial aid laws that currently exist by rules that establish which member states must assume responsibility or, in Regulation 883/2004 terminology, should operate as the competent one, and define what precise role could or should be attributed to non-competent states. This contribution reflected on some choices that could possibly be made in this regard. Other choices, however, may be possible and considered and no doubt more questions and issues may arise that have not been addressed in this contribution. There is need for more academic reflection on the topic at hand.[78]

In general, one could think of developing a coordination regime for student financial aid comparable to the ones that are included in Regulation 883/2004 for other social benefit systems. One might even consider including student financial aid in the regulation. In principle, a specific coordination regime for student financial aid would certainly be desirable as free movement is for students, as it is for all other Union citizens, indeed a constitutional right that ought to be protected by more than just some policy promises that might or might not materialise.

At the same time, to make progress there is not necessarily a need to work on a comprehensive coordination regime. The relatively more easy solution of eliminating the duty imposed on member states by Article 7(2) of Regulation 492/2011 to extend portable aid to non-resident workers and children is worth considering. In fact, much can be said for such a solution. It affects free movement of workers only indirectly and minimally, whilst it may take away many of the existing concerns about portable aid. The positive impact which this simple solution may have on free movement of students far outweighs the negative impact it might have on free movement of workers.

---

[78] An issue that interested academics may have to include too is one that this author has not (yet) dared to burn his fingers on: how to best coordinate direct (student financial aid) and indirect (family benefits) financial support systems for children/students.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

BIBLIOGRAPHY

Davies, G (2005), 'Higher Education, Equal Access, and Residence Conditions: Does EU Law Allow Member States to Charge Higher Fees to Students not Previously Resident?', *Maastricht Journal of European and Comparative Law* 227–240.

De Witte, F (2013), 'Who Funds the Mobile Student? Shedding some Light on the Normative Assumptions Underlying EU Free Movement Law: Commission v Netherlands,' *Common Market Law Review* **50**(1) 203–215.

Dougan, M (2005), 'Fees, Grants, Loans and Dole Cheques: Who Covers the Costs of Migrant Education within the EU?', *Common Market Law Review* 943–986.

Garben, S (2011), *EU Higher Education Law: The Bologna Process and Harmonization by Stealth*, The Hague: Kluwer Law International.

Lam, Q, D Oste, with Irina Ferencz and Bernd Wächter (2013), *Portable State Grants and Loans: An Overview and their Contribution to Outgoing Student Mobility*, Bonn: Lemmens Medien GmbH.

O'Leary, S (2014), 'The Curious Case of Frontier Workers and Study Finance: *Giersch* - Case C-20/12, *Elodie Giersch* v *État du Grand-Duché de Luxembourg*, Judgment of the Court of Justice (Fifth chamber) of 20 June 2013, nyr,' *Common Market Law Review* **51** 601–622.

Simans, F (2013), *La nouvelle loi sur les aides financières: nouvelle maladresse du Gouvernement?*, available at http://luxlegal.wordpress.com/2013/08/02/la-nouvelle-loi-sur-les-aides-financieres-nouvelle-maladresse-du-gouvernement.

Skovgaard-Petersen, H (2013), 'There and Back Again: Portability of Student Loans, Grants and Free Support in a Free Movement Perspective', *European Law Review* 783–804.

Van der Mei, AP (2003), *Free Movement of Persons within the European Community – Cross-Border Access to Public Benefits*, Oxford: Hart Publishing.

Van der Mei, AP (2011), 'Cross-Border Access to Healthcare and Entitlement to the Complementary "*Vanbraekel*-Reimbursement"', *European Law Review* 431–440.

Vossensteyn, J (2004), *Portability of Student Financial Support. An Inventory in 23 European Countries* (The Hague: Ministerie van Onderwijs, Cultuur en Wetenschap).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:51:10PM
via University College London (UCL)

19. Patient mobility and healthcare in the EU

*Oxana Golynker**

I. INTRODUCTION: FACILITATION OF PATIENT MOBILITY WITHOUT ENCOURAGING TREATMENT OUTSIDE THE MEMBER STATE OF AFFILIATION?

Cross-border mobility of patients within the territory of the European Union falls within the scope of provisions of EU law on coordination of social security systems and the TFEU provisions on free movement of services. Patients are not only persons who may be entitled to benefits in kind with regard to medical treatment received in the Member State other than the competent state, under Articles 19 and 20 of Regulation 883/2004, but also service recipients who exercise their right to free movement under Article 56 TFEU. In particular, the case law of the Court of Justice has been instrumental in the development of the free movement of services aspect of patients' mobility. Also, interaction between social security and free movement of services in healthcare provision is an important part of European integration and, in particular, the post-Lisbon objective of sustainable development of Europe on the basis of 'social market economy'.[1]

Yet, bringing together social security and free movement of services is a difficult task. As was acknowledged in Directive 2011/24 on the Application of Patients' Rights in Cross-Border Healthcare,[2] notwithstanding the possibility for patients to receive cross-border healthcare, Member States retain responsibility for providing safe, high-quality, efficient and quantitatively adequate healthcare to citizens on their territory. In most European healthcare systems, the national health social contract is based on the principle of sharing financial risks associated with ill health via a form of social solidarity so that no individual in need of care is prevented from accessing it because of inability to pay for the cost of medical services.[3] This social contract has already come under strain for demographic, political and economic reasons, including the budget spending discipline within the new governance structure of Europe 2020 created under

* I would like to thank Michael Dougan and Robin White for their comments on an earlier draft of this chapter.

[1] Article 3(3) TFEU. See further S Giubboni, 'Social Europe After the Lisbon Treaty. Some Sceptical Remarks' (2011) 4 *European Journal of Social Law* 244.

[2] [2011] OJ L88/45.

[3] This relates to both Bismarckian and Beveridgian systems. See A Weale and S Clarke, *High Quality, Comprehensive and Without Barriers to Access? The Future of Healthcare in Europe* (UCL 2011) www.ucl.ac.uk/european-institute/analysis-publications/publications/FHE_FINAL_online.pdf.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

the Growth and Stability Pact.[4] Opening up the market of healthcare services, including universal tax-funded healthcare systems, championed by the Court of Justice in the form of negative harmonisation, further affects the national health social contract in the way which is inconsistent with the demands of political accountability in a democratic society.[5] There is a danger that the Court's policy of protecting individual rights of patients as service recipients will undermine the ability of the Member States to deliver a universal healthcare service within the resources.[6] Therefore, it is important to conceptualise regulation of cross-border patient mobility with regard to compatibility of healthcare and free movement of services and the potential for their organic symbiosis.

The traditionally perceived correlation between healthcare and the market is a dichotomy: the logic of public health systems is based on protection through exclusion and closure, whereas the logic of the internal market is based on the benefits of inclusion and openness.[7] This view reflects the difficulty and controversy of bringing together social solidarity and the internal market, which became particularly clear in the attempt to include provisions on cross-border healthcare in the draft Services Directive,[8] which was abandoned in favour of a specialised piece of legislation in the form of the Patients' Rights Directive.[9] The focus on the conflict between social solidarity and the internal market has been inherited by Directive 2011/24 and reflected in its conceptually confusing objective to facilitate access to cross-border healthcare[10] and achieve cross-border patient mobility[11] without encouraging patients to receive treatment outside their Member State of affiliation.[12] This chapter investigates the impact of an antagonistic approach on coherence and effectiveness of the current network of regulation of cross-border patient mobility. It also presents a critical assessment of the potential of the current regulation of cross-border patient mobility

---

[4] See E Szyszczak, 'Putting the Market into the Social: "Be Careful What We Wish For"', in J Fejø et al (eds), *In Honour of Ruth Nielsen* (Jurist-OG Øconomforbundets Forlag 2013) 357, 368.

[5] See further C Newdick, 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' (2006) 43 *CMLRev* 1645–1668; P Koutrakos, 'Healthcare as an Economic Service', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 105–130.

[6] A Cygan, 'Public Healthcare in the European Union: Still a Service of General Interest?' (2008) 57 *International Comparative Law Quarterly* 529–560.

[7] See T Hervey, 'The Impact of European Union Law on the Health Care Sector: Institutional Overview' (2010) 16 *Eurohealth* 5–7; T Hervey, 'Social Solidarity: A Buttress against Internal Market Law?', in J Shaw (ed), *Social Law and Policy in an Evolving European Union* (Hart Publishing 2000) 31–47.

[8] Proposal for a Directive of the European Parliament and of the Council on services in the internal market COM/2004/2 final. Provisions on healthcare were excluded from the final version of the Directive agreed by Ministers at the December 2006 European Council. See Directive 2006/123 on services in the internal market.

[9] See S de La Rosa, 'The Directive on Cross-border Healthcare or the Art of Codifying Complex Case Law' (2012) 49 *Common Market Law Review* 15–46. See also F Pennings, 'The Cross-Border Health Care Directive: More Free Movement for Citizens and More Coherent EU Law?' (2011) 13 *European Journal of Social Security* 424–452.

[10] Article 1(1) of Directive 2011/24.

[11] Directive 2011/24 Rec (5) of the Preamble.

[12] Directive 2011/24 Rec (4) of the Preamble.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

with a view of transformation of the healthcare market into the area of service provision where the interests of mobile patients and the national solidaristic community are not in conflict.

Firstly, the symbiosis of EU provisions on social security and free movement of services has made it possible for mobile patients to choose between respective mechanisms of regulation. This means that the new scope of entitlements with regard to cross-border healthcare came together with the responsibility of making the choice.[13] The duty of the Member States to provide information that enables patients to make an informed choice ensures effectiveness of the right to access to cross-border healthcare. However, the transposition of Directive 2011/24 into the national laws shows that the Member States are still uncertain how it can be ensured that the patient chooses the more beneficial provision for him or her.[14] It is not easy to draw the line between making the patients aware of their rights and advertising cross-border healthcare. In that respect, the chapter seeks to analyse whether the current network of regulations on social security and free movement of healthcare services enables patients to make an informed choice of the legal mechanisms and healthcare providers.

Secondly, the objective of minimising the impact of cross-border patient mobility underpins Directive 2011/24. The principle of territoriality of healthcare provision is acknowledged in the Preamble of the Directive.[15] It is also declared that the rights of patients to receive cross-border healthcare should not undermine the solidaristic connection expressed in the responsibility of the Member States to provide safe, high-quality, efficient and quantitatively adequate healthcare to citizens in their territory. The EU legislator explicitly tries to reassure the Member States, emphasising the limited effect of cross-border patient mobility due to linguistic barriers, geographical distance, the cost of staying abroad, and the lack of information about the care provided in other Member States.[16] At the same time, the natural disincentives to cross-border mobility of patients are viewed in a negative light as obstacles to the effectiveness of the right to receive healthcare services abroad. Yet, should the interests of consumer citizens and the national solidaristic community necessarily be antagonistic? The chapter investigates whether cross-border patient mobility can be regulated in a way that would allow it to blend organically into the fabric of the national health social contract. The following aspects are examined in that regard. How does EU regulation of cross-border patient mobility affect the distribution of financial burden between the Member States and patients? Does the EU provide sufficient support to the Member States in performing their duty to comply with Article 56 TFEU? To what extent is the EU prepared to facilitate transformation of cross-border healthcare from reimbursement transactions to cooperation partnerships?

---

[13] Y Jorens and JP Lhernould, *European Report 2013*. Project DG EMPL/B/4-VC/2012/1110 (trESS December 2013) 30.

[14] Ibid.

[15] Directive 2011/24 Preamble, Rec (4).

[16] Case C-385/99 *Müller-Fauré and van Riet* [2003] ECR I-4509.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

II. SHOPPING AROUND IN THE NETWORK OF EU REGULATION OF CROSS-BORDER HEALTHCARE: THE EFFECT OF AN ANTAGONISTIC APPROACH

II.i The Choice of the Legal Mechanisms: From the *Kohll* Judgment to Directive 2011/24 and Beyond

As is acknowledged in Directive 2011/24 codifying the jurisprudence of the Court, in the absence of agreement between the Member States to harmonise the national laws, the development of EU regulation of patient mobility is and is likely to continue to be driven by negative harmonisation.[17] Within this framework, the relationship between mobile patients and national authorities is naturally shaped as antagonistic. In the *Kohll* judgment[18] the Court challenged prior authorisation of treatment abroad as the main instrument of control over access to cross-border healthcare and reimbursement of its cost by applying a wide-ranging concept of non-discriminatory obstacles to access to the market of healthcare services. The argument that the requirement of prior authorisation did not have either purpose or effect to restrict freedom to provide services, but merely laid down conditions for the reimbursement of medical expenses was rejected by the Court. Although the rules of authorisation do not deprive insured persons of the possibility of approaching a service provider established in another Member State, they deter those persons from approaching providers of medical services established in another Member State by virtue of imposing an authorisation requirement that is not applicable to costs incurred in the state of insurance and by virtue of denying reimbursement to persons who failed to obtain prior authorisation.[19] On the other hand, the Member States can justify restrictions on access to cross-border healthcare, especially in the context of in-hospital treatment.[20] Within this matrix, objective justification serves as a mechanism of resolution of the conflict between the interests of mobile patients and the Member States in the context of application of Article 56 TFEU.

From the *Kohll* judgment there emerged a symbiosis of two mechanisms of regulation of cross-border patient mobility bringing together case law on the application of Article 56 TFEU to cross-border healthcare services codified in Directive 2011/24 and legislation on coordination of social security schemes. Effectively, patients wishing to have access to healthcare in another Member State can now choose not only the healthcare provider, but also the legal mechanism that suits their needs. According to Article 2 of Directive 2011/24, it applies without prejudice to Regulation 883/2004 on coordination of social security systems and the implementing Regulation 987/2009. The Directive does not replace, but complements, the coordination regulations.[21] As the Court explained in *Kohll*, social security coordination regulations have a very specific,

---

[17] Rec (12) of the Preamble.

[18] Case C-158/96 *Kohll* [1998] ECR I-1931.

[19] Ibid., paras 32–33.

[20] See Case C-157/99 *Geraets-Smits and Peerboms* [2001] ECR I-5473; Case C-372/04 *Watts* [2006] ECR I-4325.

[21] Rec (29) of the Preamble. Cf. Newdick, above note 5.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

narrow, scope of application enabling the patients to benefit from the mechanism of direct reimbursement of the cost of treatment between the Member State of treatment and the competent Member State, at the tariffs in force in the Member State of treatment, subject to prior authorisation. At the same time, Regulation 883/2004 does not intend to regulate and does not prevent the reimbursement of costs incurred in connection with treatment provided in another Member State at the tariffs in force in the competent state, even without authorisation.[22]

Yet, even though a patient may not need prior authorisation for the reimbursement of costs of non-hospital care, he nevertheless may ask for an authorisation in order to benefit from the provisions of the Regulation, in particular as regards the level of assumption of costs provided by the Regulation, which may be higher than the level of assumption of costs without authorisation. The Directive makes a presumption that, in most cases, patients would choose the mechanism of coordination regulations. It is emphasised that patients should not be deprived of the more beneficial rights guaranteed by the Union Regulations on the coordination of social security systems when the conditions are met.[23] However, if a patient instead explicitly requests to seek treatment under the terms of the Directive, the benefits which apply to reimbursement should be limited to those which apply under this Directive. The reasons for the preference for the Directive mechanism might be the length of the authorisation procedures and refusal of authorisation, under the mechanism of Regulation 883/2004.[24]

Effectively, the choice of mechanisms of regulation comes with compromises and trade-offs. Provisions of Directive 2011/24 on reimbursement of the cost of treatment are less generous for the patients than the corresponding provisions of Regulation 883/2004 and Regulation 987/2009 providing for reimbursement at the level of the actual cost of healthcare in the Member State of treatment.[25] The Directive limits the level of reimbursement or direct payment of the cost of treatment by the Member State of affiliation to the level of cost that would have been assumed by that Member State had the healthcare been provided in its territory, without exceeding the actual cost of the healthcare received.[26] As a result, if the cost of treatment in the Member State of treatment is greater than the cost of the respective treatment in the Member State of affiliation, the patient may be responsible for payment of the difference in the cost of treatment. However, there is no requirement to limit the amount of reimbursement in such cases. Article 7(4)(2) of Directive 2011/24 leaves the Member State of affiliation freedom to adopt more generous conditions of reimbursement. Therefore, if the legislation of the Member State of affiliation provides for a full reimbursement, the national authorities would not be able to invoke provisions of Directive 2011/24 to refuse reimbursement of the cost of treatment abroad in full. Thus the Member States

---

[22] See *Kohll* above note 18, para 27. Cf Newdick, above note 5.

[23] Article 8(3) of Directive 2011/24.

[24] Case C-368/98 *Vanbraekel* [2001] ECR I-5363; Case C-173/09 *Elchinov* [2011] PTSR 1308, [2011] 1 CMLR 29.

[25] Article 20(2) of Regulation 883/2004; Article 25(4) and (5) and Article 26(6) of Regulation 987/2009.

[26] Article 7(4)(1) of Directive 2011/24.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

of affiliation are free to reimburse the full cost of cross-border healthcare at their discretion. Although it disadvantages the patient, the Directive asserts the principle that other Member States' standards regarding the cost of treatment should not be imposed on the Member State of affiliation to avoid interference with the competence of the Member States.

Regarding reimbursement of related costs, such as accommodation, travel costs, or extra costs that persons with disabilities might incur when receiving cross-border healthcare, the Court held that the costs that must be reimbursed are those connected with the healthcare received in the Member State of treatment. In case of in-hospital treatment, the costs should be inextricably linked to medical services relating to the patient's stay in the hospital for the purposes of treatment.[27]

Directive 2011/24 favours a soft language of empowerment rather than obligations. Article 7(4)(3) provides that the Member State of affiliation *may* decide to reimburse such costs, under the national legislation. Further, Article 7(5) states that Member States *may* adopt provisions, in accordance with the TFEU, aimed at ensuring that patients enjoy equal treatment when receiving cross-border healthcare to that which they would have enjoyed in a comparable situation in the Member State of affiliation. Nevertheless, that does not mean that the obligation to reimburse ancillary costs should never arise. The Member States must exercise their rights in compliance with Article 56 TFEU and the principle of non-discrimination. Therefore, where provisions of EU law do not require, but at the same time do not prohibit, reimbursement of the costs, the ancillary costs must be reimbursed if the national legislation of the state of affiliation imposes a corresponding obligation in the national system.[28]

The informed choice of the mechanism of regulation of cross-border healthcare requires clarity and transparency regarding the requirement of authorisation. Negotiation of Directive 2011/24 resulted in formalising the rules in the form of an exhaustive list of grounds when prior authorisation can be required, under Article 8(2) of the Directive.[29] Yet, case law guidance is still required. The relationship between the two mechanisms of reimbursement in terms of the fall-back options for consumer patients was examined in *Luca*,[30] where the Court explained that where a refusal to grant reimbursement, because of the absence of prior authorisation alone, of the cost of treatment in another Member State paid for by the insured person is unfounded, that person is entitled to reimbursement of the full amount of expenditure actually incurred in the Member State of treatment. Even when the refusal of full reimbursement of hospital care is justified under Article 20 of Regulation 883/2004, the insured person can still claim, under Article 56 TFEU, reimbursement of hospital care within the limits of the coverage provided by the Member State of affiliation.

---

[27] Case C-466/04 *Acereda Herrera* [2006] ECR I-5341. See also V Pascalia, 'Co-ordination of Social Security in the European Union: An Overview of Recent Case Law' (2009) 46 *Common Market Law Review* 1177, 1203–1204.

[28] For a similar approach regarding Article 22 of Regulation 1408/71 see Case C-8/02 *Leichtle* [2004] ECR I-2641; Case C-444/05 *Stamatelaki* [2007] ECR I-3185. See also F Pennings, *European Social Security Law* (Intersentia 2015) 200 ff.

[29] See de La Rosa, above note 9, 26–27.

[30] Case C-430/12 *Luca*, Order of the Court of 11 July [2013] OJ C304/3.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

The principles of prior authorisation created by the Court of Justice in *Geraets-Smits and Peerbooms*[31] and *Müller-Fauré and van Riet*[32] have now been incorporated in Article 20(2) of Regulation 883/2004 and, in a more detailed wording, in Article 8(5) of Directive 2011/24. Authorisation should be granted where the treatment in question is among the benefits provided in the competent Member State of residence and where the patients cannot be given such treatment within the time-limit which is medically justifiable, based on an objective medical assessment of their medical condition, the history and the probable course of illness, the degree of pain and/or nature of disability at the time of the request. The decisions, therefore, should be made on medical, not economic grounds. The regulations build on the *Watts* judgment, which rejected waiting lists as a basis of decisions on 'undue delay' in provision of treatment abroad.[33] According to Article 8(1) of Directive 2011/24, the system of prior authorisation, including the criteria and their application, and individual decisions should comply with the principle of proportionality and should not constitute arbitrary discrimination or an unjustified obstacle to free movement of patients.

Nonetheless, the quality of care, a significant factor affecting the patient's choice, still requires development of a creative and thoughtful application of the principles of reimbursement by both the European Court and the national courts. For example, the Regional Court of Cataluña rejected the reimbursement claim made by the parents of a Spanish child who underwent an unauthorised operation in Belgium following a misdiagnosis in Spain leading to the loss of one eye.[34] Arguably, refusal of reimbursement cannot be justifiable in such circumstances, on medical grounds, and the criterion of 'history of illness' could be interpreted to cover the unsatisfactory history of treatment in the Member State of residence.

Unfortunately, the recent guidance of the Court on this matter in the *Petru*[35] case does not make it easier for the patients to obtain authorisation. The case concerned refusal of authorisation of reimbursement of the cost of a complicated open heart operation performed in Germany on the grounds of inadequate hospital establishment and infrastructure in Romania. The request was made on the basis of Regulation 1408/71, but due to in-hospital healthcare involved in this case, the question of authorisation would also arise under Directive 2011/24.

The earlier judgment in *Elchinov* clarified that authorisation must be granted if, although the treatment in issue could be delivered without delay, it would not be as effective as the more advanced treatment in another Member State.[36] However, the decision of the Court in *Petru* presents a disappointingly diluted version of *Geraets-Smits* and *Müller-Fauré*, and also departs from the generous approach in *Elchinov* stating that the question whether the operation can be performed up to the standard and in good time in the Member State of residence must be determined by reference to all the hospital establishments in that Member State that are capable of providing the

---

31 Case C-157/99 *Geraets-Smits and Peerboms*, above note 20, paras 103 and 104.
32 Case C-385/99 *Müller-Fauré*, above note 16.
33 Above note 20, paras 62 and 63.
34 *European Report 2013*, above note 13, 30.
35 Case C-268/13 *Petru*, nyr.
36 *Elchinov* [63]–[67], above note 24.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

treatment in question and by reference to the period within which the treatment could be obtained in good time. The problem is that such a procedure may be quite lengthy, non-transparent to the patient, stressful, and may leave out of the equation the importance of convenience of the alternative place of treatment: high-quality care abroad might be more convenient and beneficial for recovery than treatment in a remote hospital in the Member State of residence with a poor standard of care.

The decisions on authorisation of treatment on grounds of quality are also complicated by the scope of obligation to reimburse the cost of cross-border healthcare, which is limited to the healthcare to which the insured person is entitled in the Member State of affiliation.[37] More specifically, entitlement to reimbursement corresponds only to the benefits provided for by the legislation of that Member State.[38] The practical problems of interpretation arise where a more advanced treatment method is available in another Member State. The Member States are under an obligation to reimburse the cost of treatment method which, although not available in the competent Member State, corresponds to benefits provided for under its legislation.[39] Even though the Member States must exercise their powers in compliance with the principle of non-discrimination, patients may find it difficult to challenge the interpretation of the insurance package by the national authorities.[40]

Finally, the effect of *Kohll* has been considerably narrowed in the subsequent case law in which the concept of objective justification proved to be particularly effective in the context of in-hospital treatment.[41] Moreover, to reflect the judgment in *Commission v France*,[42] the blurred boundary between in-hospital and out-of-hospital care has been taken into account in Article 8(2)(a)(ii) of Directive 2011/24 to give the Member States the right to require prior authorisation in day-care cases that do not involve overnight hospital accommodation, but require highly specialised and cost-intensive medical infrastructure or medical equipment.[43] In practice, more problems with authorisation of cross-border healthcare can occur due to the blurred distinction between occasional care and planned care. For example, the Austrian Supreme Court denied entitlement to reimbursement of the cost of treatment for an emergency operation required after complications occurred following an unauthorised in-hospital treatment performed on an Austrian national in Germany.[44] Depending on the chain of cause and effect, the national courts may answer differently the essential question on the purpose of the treatment.

---

[37] Rec (13).

[38] Directive 2011/24, Rec (33) of the Preamble; Article 8(5) of Directive 2011/24, Article 20(2) of Regulation 883/2004.

[39] Ibid.

[40] See also AP van der Mei, 'Commentary on *Elchinov*' (2011) 48 *Common Market Law Review* 1297–1311.

[41] See Case C-157/99 *Geraets-Smits and Peerboms*, above note 20.

[42] Case C-512/08 *Commission v France* [2011] CMLR 30.

[43] Article 8(2)(a)(ii) of Directive 2011/24.

[44] *European Report 2013*, above note 13, 29.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

II.ii The Right to Information

Shopping around in the EU cross-border healthcare market requires enabling patients to make an informed choice of the healthcare provider and the legal mechanism that suits their circumstances. How does the antagonistic approach to regulation of cross-border healthcare affect the scope of Member States' obligations to enable such a choice, which, according to that approach, should be exercised without encouraging cross-border patient mobility? Article 8 of Directive 2011/24 clarifies the correlation and the choice between the Directive and Regulation 883/2004. As is acknowledged in the Preamble to Directive 2011/24, appropriate information on all aspects of cross-border healthcare is necessary in order to enable patients to exercise their rights on cross-border healthcare in practice.[45] Directive 2011/24 lays down a number of provisions that should ensure effectiveness and facilitate the exercise of the right of access to healthcare in another Member State. Respective measures and structures established by the Member States under the provisions of the Directive can be accessed by patients irrespective of their choice of the legal mechanism, either coordination of social security or the Directive path. It is the system of provisions that enables the choice of the consumer patient that effectively brings EU provisions of patient mobility to the level of a network rather than a patchwork of regulation.

Directive 2011/24 clarifies that it is a duty of the Member States to ensure that patients are able to make an informed choice and effectively provides for the right of patients to information on request. National contact points are specifically identified as a compulsory mechanism for providing information on cross-border healthcare that must be established in each Member State.[46] The Member States also have to work together with the Commission to ensure cooperation between national contact points and make relevant information available at Union level.[47]

National contact points for cross-border healthcare in both the Member State of affiliation and the Member State of treatment should enable patients to make use of their rights in relation to cross-border care.[48] The choice of the form and number of national contact points is left to the Member States to reflect the specific organisation of national healthcare systems.[49] However, in exercising that freedom, Member States should comply with the requirements of efficiency, transparency and accessibility of information, which is expressed specifically in the duty to provide information in electronic form.[50]

To achieve their objectives, networks of national contact points in the Member States of treatment should provide patients with information concerning healthcare providers, information on patients' rights, complaints procedures and mechanisms for seeking remedies, according to the legislation of the state of treatment, as well as the legal and administrative options available to settle disputes, including in the event of harm in the

---

45 Rec (48).
46 Rec (48).
47 Rec (49).
48 Article 6 of Directive 2011/24.
49 Rec (49).
50 Rec (49) and Article 6(5) of Directive 2011/24.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

course of cross-border healthcare.[51] The Member States of treatment are also responsible for the provision by the healthcare providers of relevant information enabling individual patients to make an informed choice.[52] Networks of national contact points in the Member States of affiliation must provide patients on request with the information on their rights and entitlements to receive cross-border healthcare, including reimbursement of costs, procedural mechanisms and the rights to appeal and redress.[53] Where the patient is entitled to cross-border healthcare under both this Directive and Regulation (EC) No 883/2004, and the application of the Regulation is more advantageous to the patient, the patient's attention should be drawn to this by the Member State of affiliation.[54] The obligation to provide information entails the duty to draw a clear distinction between the rights which patients have by virtue of Directive 2011/24 and the rights arising from Regulation 883/2004.[55] The possibility for the patients to invoke the doctrine of state liability in the event of damages caused by the failure of the national authorities to comply with those duties should be tested.

At the same time, the obligations of the Member States under Articles 4 and 5 of the Directive are limited, if read in conjunction with the Preamble stating that the application of the rules on free movement of services to cross-border healthcare should not result in patients being encouraged to receive treatment outside their Member State of affiliation.[56] Support for this view can be found in Article 4(2)(b) of the Directive, which acknowledges the concerns of the Member States over the additional burden on healthcare practitioners arising from the information obligation.[57] Healthcare providers in the Member State of treatment are not required to provide more extensive information than that already provided to resident patients. The duty to provide information does not include the obligation to ensure accessibility of information in a range of languages, despite the effect of linguistic barriers on the patients' choices.[58] Finally, engaging a variety of mechanisms of information is not required, due to the assumption that the electronic form is the best option in terms of compliance with the requirements of efficiency, transparency and accessibility of information.[59]

Such a minimalistic approach to the duty to provide information can hardly ensure effectiveness of the right to access to cross-border healthcare. Although the Member States cannot be required to promote cross-border healthcare, it is essential to ensure awareness of patients of their rights and choices. However, in practice, the line between raising awareness and encouragement might be fine. For example, a national advertising campaign would raise awareness among all members of the national community, including those who are less likely to have access to the Internet, but might have an effect of a promotion campaign.

---

51 Article 4(2)(a) and Article 6(3) of Directive 2011/24.
52 Article 4(2)(b).
53 Article 5(b) of Directive 2011/24.
54 Directive 2011/24, Preamble, Rec (31).
55 Article 5(b) of Directive 2011/24.
56 Rec (4) of the Preamble. See also Pennings, above note 28, at 447.
57 See below note 69, para 119.
58 Article 4(5) of Directive 2011/24.
59 Article 6(5) of Directive 2011/24.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

To conclude, the choice between the legal mechanism of social security coordination regulations and Directive 2011/24 is affected by the compromises and trade-offs that ensue from the antagonistic positioning of the interests of mobile patients and national health authorities in the case law. On the one hand, the antagonistic approach is part and parcel of negative harmonisation. But on the other hand, it is rooted in the negative perception of the impact of cross-border patient mobility on the healthcare systems, which warrants justifiable restrictions on the right to receive healthcare services in another Member State. The next part of the chapter examines the framework of the assessment of regulation of patient mobility with regard to the threat to financial integrity of national healthcare systems.

III. THE EFFECT OF EU REGULATION OF CROSS-BORDER PATIENT MOBILITY ON THE DISTRIBUTION OF FINANCIAL BURDEN BETWEEN MEMBER STATES AND PATIENTS

The impact of cross-border mobility on the national healthcare systems is a contextual phenomenon which cannot be understood in isolation from the current socio-economic developments in the national healthcare systems. The national welfare states face similar problems and challenges, such as demographic change, transformation of the labour market, economic shifts, family changes, social changes, and the pressures put on national budgets by national debts and the global financial crisis of 2008 followed by the 2008–2012 global recession.[60] Yet, while addressing similar objectives, the Member States differ both in terms of the scope of ambitions and delivery strategies defined by economic and political context, institutional legacies, inherited system of characteristics, and vested interests.[61] On the one hand, the current general trends of European welfare states have been defined by the common need for budget consolidation as a reaction to the soaring public debt. As a result, austerity programmes brought forward by the governments of the Member States across the European Union have been the major factor in the approach of the governments to social security issues in both a national and a cross-national context. According to a recent study, all Member States focus predominantly on cuts in spending, rather than increasing taxes or social contributions.[62] On the other hand, considerable differences can be observed with regard to consolidation approaches. Those differences can be traced back to variations

[60] See P Taylor-Gooby, 'The Response of Government: Fragile Convergence?' in V George and P Taylor-Gooby (eds), *European Welfare Policy. Squaring the Welfare Circle* (Macmillan 1996) 204–205.

[61] See G Esping-Andersen, 'After the Golden Age? Welfare State Dilemmas in a Global Economy', in G Esping-Andersen (ed), *Welfare States in Transition. National Adaptations in Global Economies* (Sage Publications 1996) 6; G Esping-Andersen, *The Three Worlds of Welfare Capitalism* (John Wiley and Sons 1990); T Hervey, 'Social Security: The European Union Dimension', in N Harris (ed), *Social Security Law in Context* (Oxford University Press 2000) 231.

[62] A Heise and H Lierse, 'The Effects of European Austerity Programmes on Social Security Systems' (2011) 2 *Modern Economy* 498–513.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

in national circumstances and therefore the existing scope for cuts and tax increases. Also, different values of the governments and different national traditions play an important role in the choice of consolidation strategies. Whereas some Member States have focused on welfare cuts, for others, they have been less significant. In Spain the cuts represent only 5 per cent, whereas in Germany about one-third of all consolidation measures involve social security reforms.

Although the scope of those measures differs by country, the common feature is turning away from state benefits to individual co-payments and risk provision.[63] In healthcare, cuts have been made through a range of measures, such as spending cuts, price and cost caps, increasing resort to generic drugs, less in-patient treatment, and individual co-payments. For example, according to the Institute of Fiscal Studies, the NHS spending per person in the UK is predicted to fall by 9 per cent over the next eight years.[64] In this context, the cost of cross-border patient mobility for the national healthcare systems is assessed by the Member States against the already existing need to review the national healthcare contract.

The regulations on coordination of social security schemes and Directive 2011/24 are based on the presumption that patient flows between Member States are limited and expected to remain so as the vast majority of patients in the EU receive healthcare in their own country and prefer to do so, despite the growing awareness of healthcare possibilities in other Member States.[65] That assumption may be correct as, for example, the cost of treatment of EEA nationals accounts for only 2 per cent of the NHS (National Health Service) spending in the UK.[66] The factors that limit patients' mobility have been highlighted by the Court in *Müller-Fauré*, such as linguistic barriers, geographical distance, the cost of staying abroad, and the lack of information about the care provided in other Member States. Nevertheless, creation of national contact points can help reduce the effect of those obstacles. Further, the extraneous factor of financial difficulties may affect the quality, accessibility and cost of healthcare unevenly and create conditions for demand for cross-border healthcare. The disparity in healthcare spending per inhabitant, which varies from PPS 674 in Bulgaria to PPS 4,445 in Luxembourg, is also a contributing factor.[67] In terms of cross-border healthcare provision, the implementation of Directive 2011/24 has already raised concerns about the flow of patients between countries with high fees and countries with low fees and towards countries providing excellent medical care.[68]

How are the problems of financial impact addressed in the existing network of regulation of patient mobility? First of all, it is important that the mechanism of review of the impact is built into Directive 2011/24. The impossibility of making accurate predictions is acknowledged in Article 20 of the Directive, which requires the first

---

[63] Ibid., at 510.

[64] www.bbc.co.uk/news/health-26051707. Accessed on 5 February 2014.

[65] Directive 2011/24. Recital 39 of the Preamble. See also Note from the Council to the Working Party on Competitiveness and Growth 11570/04 of 16 July 2004, 7.

[66] This can be compared with the Commission's prediction of the average of 1 per cent of spending.

[67] Eurostat, *Healthcare Statistics* January 2014. The Purchasing Power Standard is an artificial currency unit.

[68] *European Report 2013*, above note 13, at 30.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

review to be submitted by 25 October 2015 and thereafter every three years.[69] The Directive also specifies the scope of the review to cover information on patient flows, financial dimensions of patient mobility, and implementation of Article 7(9) and Article 8 of the Directive.[70]

As is acknowledged in Regulation 987/2009, EU law should reflect the need for a balanced sharing of costs between the Member States that bear the cost of allowing insured persons access to their healthcare system and the Member States whose institutions bear the cost of benefits in kind received by their insured persons in another Member State.[71] The problem is also recognised by the legislators in Directive 2011/24, which endeavours to prevent 'any significant effect on the financing of the national healthcare systems'.[72] The relaxation of the requirement of authorisation of treatment abroad, under Directive 2011/24, is offset by limiting the amount of reimbursement of the cost of treatment to the level of cost that would have been assumed by the competent Member State had the healthcare been provided in its territory.[73] The burden of the new obligations of the Member States, such as establishment of national contact points, is minimised by the flexibility given to the Member States as regards the form, the number, and the freedom to incorporate them in or build on activities of existing information centres.[74]

Both the social security coordination regulations and Directive 2011/24 ensure the interests of the Member State of affiliation by explicit restriction of the cost of healthcare assumed by that state. Under Regulation 883/2004 the amount of reimbursement is limited at the level of the actual cost of healthcare in the Member State of treatment.[75] The personal scope of Directive 2011/24 is explicitly linked to, and limited by, the personal scope of Regulation 883/2004.[76] The Directive also has a more restrictive approach to reimbursement of the cost of treatment and limits it to the level of cost that would have been assumed by the competent Member State had the healthcare been provided in its territory.[77] Therefore, assumption of the cost of healthcare in another Member State, under Article 56 TFEU, should not impose any extra burden on the healthcare system of the Member State of affiliation. Furthermore, the amount of cost of healthcare assumed by the Member State of affiliation is limited to the actual cost of the healthcare received.[78] Therefore, the effect of cross-border patient mobility on the welfare system of the Member State of affiliation is limited to

---

[69] Initially, a five-year period was considered, but reduced to three years under pressure from the Member States. See the House of Lords European Union Committee 4th Report of Session 2008–09 *Healthcare Across EU Borders: a Safe Framework*, para 186. www.publications.parliament.uk/pa/ld200809/ldselect/ldeucom/30/9780104014356.pdf.

[70] Article 20(2) of Directive 2011/24.

[71] Rec (15) of the Preamble.

[72] Rec (29) of the Preamble.

[73] Article 7(4)(1) of Directive 2011/24.

[74] Rec (49).

[75] Article 20(2) of Regulation 883/2004; Article 25(4) and (5) and Article 26(6) of Regulation 987/2009.

[76] Articles 3(b) and 7(1) of Directive 2011/24 and Article 2 of Regulation 883/2004.

[77] Article 7(4)(1) of Directive 2011/24.

[78] Article 7(4) of Directive 2011/24.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

the extent that patients should, in any event, not derive a financial advantage from the healthcare provided in another Member State.[79]

Further, the coordinating regulations take account of the need for an effective mechanism of reimbursement of the cost of cross-border health services between respective Member States[80] by asserting the principle of full reimbursement to ensure that no unfair expenses are borne by the country of treatment and, conversely, no undue claims are paid by the competent Member State. However, some aspects of the current regulation can lead to financial ramifications in respective Member States. The approach to mitigating the ramifications in social security coordination regulations and Directive 2011/24 differs according to the respective mechanisms of reimbursement of the cost of cross-border healthcare. The Directive's mechanism whereby the Member State of treatment receives payment for the cost of treatment from the patient, whose expenses are subsequently reimbursed by the Member State of affiliation, secures the interests of the Member State of treatment in a more efficient way than the delayed direct reimbursement of the cost of treatment by the competent Member State, under the coordination regulations. Also, there is uncertainty over the mechanism of compensation sought by the competent Member State from the Member State of treatment for the cost of rectifying clinical mistakes made in that state.

Moreover, the disparity in the healthcare systems' organisation causes problems where Member States do not have legal or administrative structures for reimbursement on the basis of actual expenditure and have to operate the system of 'fixed amounts'.[81] In that regard, the problems of the time-limit for claiming reimbursement claims and predictability of the cost of reimbursement as updated by the creditor country are important for minimising the impact of patient mobility on the national healthcare systems.[82]

In this context, the impact of EU regulation of cross-border patient mobility combined with the financial problems may lead to reshaping the discourse on the solidaristic rights and obligations of the national solidaristic community and its members. The debate over the NHS in the UK provides a very good example of this. The controversy of extending the rules on free movement of services to healthcare provided free at the point of use in *Watts* is undeniable if approached from the vantage point of the traditional orthodox view of tax-funded universal healthcare.[83] Yet, it is likely to acquire a different dimension due to the growing pressure to charge NHS patients, in some form, for medical care dictated by the inherent problems of funding the cost of care provision and to outsource services to the private sector. The Institute for Fiscal Studies predicted that spending on the NHS might fall by 9 per cent per

---

[79] Rec (32) of the Preamble.

[80] Article 35(2) of Regulation 883/2004.

[81] Article 63 of Regulation 987/2009. Such Member States are listed in Annex 3 to Regulation 987/2009 and include Ireland, Spain, the Netherlands, Portugal, Sweden, Finland, the United Kingdom, Norway and Cyprus.

[82] F Van Overmeiren (ed), *Impact Assessment of the Revision of Selected Provisions of Regulations 883/2004 and 987/2009. Analytical Study 2013. Project DG EMPL/B/4 – VC/2012/1110* (Ghent 2013).

[83] See also J Montgomery, 'Impact of European Union Law on English Healthcare Law', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 145–156.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

person over an eight-year period leading to a £30 billion funding deficit by the end of the decade.[84] Already, an emergency £2 billion bailout of the NHS has been demanded within the government due to serious concerns over an approaching crisis in patient care, and in June 2014 the British Medical Association called for automatic increases in the NHS budget to cope with demand, rising by 4 per cent a year.[85] As the chairman of the British Medical Association (BMA) council pointed out, it was 'economic illiteracy' to expect the healthcare service to improve without extra resources.

The cash crisis can lead to three scenarios with different outcomes that can influence the debate on the application of the rules on free movement of services to the NHS. The most radical scenario would be privatisation of the NHS and replacement of the state-funded system with an insurance-based system for the British system of healthcare provision, thus ending the controversy of the application of the rules on free movement of services. However, in the current political climate, the second scenario of preservation of the status quo might be a political choice dictated by the sensitivity of the matter for the electorate and the overall assessment of efficiency on the basis of access, efficiency and equality criteria.[86]

If the NHS continues to rely on budget spending as the source of funding, this will preserve the conditions for contestation of the regulation of cross-border patient mobility on the basis of free movement of services provisions as undermining the NHS on several grounds, such as damaging erosion of resources, from the economic point of view, and creation of social inequality between a poor population and a wealthy population enabled by free movement of patients to jump the queue.

The third scenario would be the unknown terrain of the introduction of a hybrid system of healthcare provision with some elements of privatisation and/or pay-for-healthcare services. The clash between the cash shortage and the orthodoxy of the NHS founding principle of free care at the point of use has already led to proposals to charge patients a £10 fee to see their GP supported by some members of the Royal College of Nursing, but rejected by the BMA's GP committee in May 2014 and the Department of Health.[87] Nonetheless, the element of partial privatisation of the NHS and outsourcing of services to private providers or working in partnership with private insurance sector in the area of healthcare has already taken place in some parts of the NHS. In 2014 the NHS was planning its biggest and most wide-ranging outsourcing of services so far by inviting companies to bid for £1.2bn in contracts to provide frontline cancer treatment in district hospitals and care for the terminally ill in some regions. The deals are aimed at the private sector delivering all cancer and end-of-life treatment involving diagnosis and treatment such as radiology, radiotherapy, breast screening, chemotherapy, nursing and surgery for patients in hospitals, hospices and at home.

Emergence of such hybrid systems is significant for the future choice of the mechanisms of regulation of cross-border healthcare as they put in question the

---

[84] *Cost of living crisis to turn around this year, IFS says*, www.bbc.co.uk/news/business-26048205. Accessed on 5 February 2014.

[85] *The Times* 23 June 2014.

[86] www.commonwealthfund.org/~/media/files/publications/fund-report/2014/jun/1755_davis_mirror_mirror_2014_exec_summ.pdf.

[87] *The Times* 18 June 2014.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

suitability of coordination of social security systems as the only basis for the regulation of social security in the Union.[88] More specifically, healthcare services commissioned by the NHS from the private healthcare providers are usually fast-track and, in that respect, do not differ from the 'queue jumping' situation when treatment is received in another Member State. Also, there is a disparity of availability of and, consequently, access to such treatment in different regions of the country. Therefore, the hybrid system undermines the argument of social solidarity and fairness used against the application of free movement of services rules to patient mobility raised in the *Watts* case. Effectively, opening up the national market of healthcare from within through privatisation and outsourcing of healthcare provision to private providers makes it difficult to maintain the argument on incompatibility of the NHS healthcare model with the open market of cross-border patient mobility. As the UK Department of Health emphasised, the private sector was competing against the non-profit sector as well as social enterprises. Although there is no open government policy to privatise NHS services, and there are assurances that the NHS will stay free for everyone, patients are treated as customers who have the right to get the best service – 'regardless of who provides it'.[89] From that perspective, healthcare as the public good may be delivered better if it becomes a hybrid phenomenon retaining its traditional solidaristic nature, but at the same time becoming a commodity.

Further, the need to address the financial effects of the application of patient mobility rules can lead to different choices and strategies that might favour different legal mechanisms. In particular, problems arise at the level of application of reimbursement rules under Regulation 883/2004 and Regulation 987/2009. For example, in July 2014, the UK Health Secretary revealed that while £500m could be recovered in the cost of healthcare provided for treatment of patients as 'EU visitors', in the preceding year only 17 per cent of that figure had been collected by the government.[90] The main reason for the low level of reimbursement is thought to be the lack of incentive for hospitals to complete paperwork necessary for collection of non-UK patients' details. From the perspective of the Member State providing healthcare services, the malfunctioning of the reimbursement system between Member States under the coordination of social security rules makes the mechanism of patients' paying in advance under the Patient's Directive more attractive. At the same time, the right of mobile patients to choose between the two routes of receiving cross-border healthcare means that the Member States have to look for the self-correcting solutions that would minimise the downsides of the social security option of reimbursement of healthcare costs. The current strategy in the UK involves a financial incentive by paying hospitals 25 per cent above the normal NHS tariff for the procedure they undertake, in return for collecting the information.[91] Moreover, the effective application of the reimbursement mechanism allows refocusing on the assessment of the data on the treatment of visiting EEA

[88] See R White, *EC Social Security Law* (Longman 1999) 133.

[89] See G Plimmer, 'Private Groups Invited to Help NHS Buy Services', *Financial Times* 25 February 2014.

[90] See S Neville and J Parker, 'Hospitals to be Paid for Reporting Treatment of EU Patients', *Financial Times* 17 July 2014.

[91] Ibid.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

patients from the cost to the benefits of provision of cross-border healthcare services. For example, the UK Health Secretary has claimed that the effective reimbursement of cross-border healthcare services in the UK would allow improvement in patient care by funding about 1400 consultants, 4700 nurses or 34,000 knee replacements.[92]

At the same time, the impact of provisions on cross-border patient mobility may act as an incentive to improve the delivery of healthcare at the local level, in order to minimise diversion of financial resources abroad. It can be argued that the impact of the consumer choice element is limited in scope due to the restriction on the right of patients to choose healthcare abroad imposed by the prior authorisation requirement in some cases. Nonetheless, the self-correcting element in provision of healthcare is likely to ensue from opening up the market of healthcare services in the EU either as a result of healthcare providers acting on their own initiative or due to the pressure from the government or insurers to reduce waiting lists and improve quality of treatment.[93]

This evidence undermines the arguments of the critics of extension of the internal market rules to cross-border provision of healthcare who warn against dangers altering the character of the national welfare organisation by undemocratic imposition on the Member States of libertarian values which favour free market individualism over collective solidarity of generations and historically determined choices.[94] On the one hand, it is hard to disagree that it is important to avoid the extremes of communitarianism and the need for the EU to respect the principles of subsidiarity and proportionality when creating inroads into the competence of the Member States. Yet, on the other hand, such an argument should not be based on the assumption that the relationship between the nation state and the members of the national solidaristic community is static. On the contrary, the example of the political discourse in the UK shows that the solidaristic choices on delivery of healthcare at the national level are subject to contestation and revision at the national level and represent a natural and essential democratic process. The influence of an extraneous element of EU regulation on that process is only partial and should not necessarily be negative or viewed as such by the Member States.

It would be a mistake to think that the problems of reimbursement may affect only the NHS-type healthcare systems. In June 2014 the European Commission issued binding demands to France to 'step up' austerity, including cuts to healthcare, following a protracted period of falling behind the eurozone threshold of a spending deficit of 3 per cent of GDP in breach of the obligation of Member States under Article 126(1) TFEU.[95] The impact of fiscal consolidation measures on patient mobility in the context of the insurance-based system can affect different Member States in a different way. High-quality healthcare systems that are likely to be at the receiving end of patient mobility are exposed to pressure on their capacity. Even when the mechanism of direct

---

[92] Ibid.

[93] See, for example, the comments of PA Consulting in HL Committee Report, 'Healthcare Across EU Borders: a Safe Framework', above note 69, para 32.

[94] See C Newdick, 'Disrupting the Community: Saving Public Health Ethics from the EU Internal Market', in J Van de Gronden et al (eds), *Health Care and EU Law* (Asser Press 2011) 211–213.

[95] See *The Daily Telegraph*, 2 June 2014, www.telegraph.co.uk/finance/economics/10870976/EU-orders-France-to-step-up-austerity-cuts.html. Accessed on 3 June 2014.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

reimbursement under the coordination regulations applies, the Member State of treatment has to bear some residual costs, such as administrative costs, and make a cash advance until the final reimbursement by the competent Member State. Depending on the effectiveness of the national mechanism of payment for the service provided to patients, the healthcare providers may favour patients who pay cash in advance for their treatment on the basis of Directive 2011/24. Although that would not erode the financial integrity of the healthcare system, the priority of service provision may shift against the nationals whose treatment is paid for by the insurance funds with the respective delay. As concerns were raised by the Member States during the negotiation of the draft Patients' Mobility Directive, the Commission provided reassurance that Member States should have the right to refuse to accept patients for planned treatment or to prioritise patients from other Member States, to the detriment of other patients with similar needs.[96] Now, the Directive explicitly frames the right to restrict freedom to provide medical and hospital services on grounds of maintenance of treatment capacity or medical competence in terms of 'overriding reasons of general interest',[97] which should be exercised in a non-discriminatory manner. At the same time, poorly performing insurance-type systems of healthcare that are likely to export patients across the border will be affected by the burden of reimbursement, further complicated by the variation of the cost of treatment in different Member States.

Within this framework, the financial impact of EU regulation of patient mobility is vulnerable to contestation by insurance funds. Should care insurers have the right to limit reimbursement of treatment abroad to Member States with the lower cost of treatment or should the choice of the place of treatment abroad be left to the patients irrespective of the legal basis of cross-border healthcare arrangements, social security regulations or Directive 2011/24? Already some problems have been reported regarding compatibility of national measures with EU rules, such as the Netherlands' regulations allowing insurers not to reimburse the cost of healthcare delivered by a care provider in another Member State with whom the insurance company did not conclude a contract or to reimburse the cost at a lower rate than care contracted in the Netherlands.[98]

Does the current regulation address the above concerns of the Member States without compromising cross-border patient mobility? All in all, the assessment of the impact of cross-border patient mobility in the EU does not generally present a statistically compelling case for alarming numbers of patients who make use of their rights under Article 56 TFEU or the coordination regulations. At the same time, within the bigger picture of financial problems experienced currently by national healthcare systems, even a marginal increase in spending may cause concern, if not justified. The main problem is that the assessment of impact is framed by the antagonistic model of the relationship between the mobile patients and the national healthcare system, which is reinforced by the negative harmonisation of cross-border healthcare provision in the case law of the Court of Justice. Nevertheless, it is possible to approach this matter from a different perspective and look for an alternative to the antagonistic model, and this is discussed in the next section of the chapter.

---

[96] See 'Healthcare across EU Borders', above note 69, paras 48–49.
[97] Rec (12) of the Preamble.
[98] *European Report 2013*, above note 13, at 311.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

IV. TRANSFORMING THE MARKET OF CROSS-BORDER HEALTHCARE: FROM REIMBURSEMENT TRANSACTIONS TO COOPERATION PARTNERSHIPS

The inherent downside of the regulation of access to cross-border healthcare through negative harmonisation and EU legislation is that it lacks the democratic element required for renegotiation of 'the health social contract'.[99] It creates a stereotype of erosion of the solidaristic relationship between the national solidaristic community whose interests are represented by national health authorities or healthcare providers and patients seeking treatment in another Member State. In this relationship, the duty to comply with free movement of services provisions of the Treaty and coordination of social security rules is viewed as a burden on the national healthcare system. Is it possible to break that stereotype and integrate organically the rights of patients to cross-border healthcare into the fabric of the national solidaristic relationships of healthcare provision? To achieve this objective, certain conditions should be present. The Member States have to see the benefits of opening up the market of healthcare services not only for the individuals receiving cross-border healthcare, but for the entire national healthcare system. This, in turn, requires establishment of effective mechanisms of cooperation in healthcare between Member States. Building on the principle of mutual administrative cooperation found in Article 4(3) TFEU, such mechanisms are different from positive harmonisation of laws, but go further than negative harmonisation through case law, which makes them potentially less politically controversial, but effective for opening up the healthcare market.

Although the principle of mutual administrative cooperation is not new and may be found in Article 4(3) TFEU, the shift from approaching the healthcare market purely from the vantage point of classical removal of obstacles to free movement of services in the draft Services Directive[100] towards a broad approach to opening up the healthcare market through cooperation is evident in Directive 2011/24. It addresses cooperation in healthcare in Chapter IV to include mutual assistance and cooperation,[101] recognition of prescriptions issued in another Member State,[102] European Reference Networks,[103] cooperation in the area of rare diseases, e-Health, and cooperation on health technology assessment. Whereas all those measures can contribute to facilitation of access to cross-border healthcare, mutual assistance and cooperation, together with European Reference Networks, provide the basis for fostering cooperation links between Member States and should therefore be encouraged. Nonetheless, the approach taken by the EU legislator in Directive 2011/24 does not go far enough to ensure attractiveness of cooperation for the Member States.

---

[99] The term borrowed from Weale and Clark, above note 3.

[100] Proposal for a Directive of the European Parliament and of the Council on services in the internal market COM/2004/2 final. Provisions on health care were excluded from the final version of Directive agreed by Ministers at the December 2006 European Council. See Directive 2006/123 on services in the internal market [2006] OJ L376/36.

[101] Article 10.

[102] Article 11.

[103] Article 12.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

In particular, according to Article 10 of the Directive, ensuring cooperation in cross-border healthcare provision at regional and local level, including ICT and other forms of cross-border cooperation, is an obligation of Member States. To that effect, Member States should conclude agreements among themselves. The role of the Commission appears to be limited to encouragement of such cooperation. The language of the Directive is soft, for example providing that the Commission should work together with the Member States in order to facilitate cooperation regarding national contact points for cross-border healthcare.[104] Also, cooperation in cross-border provision in border regions is given a specific prominence, which narrows the objectives to a certain extent. Although the cross-border regions might be in particular need of establishing effective mechanisms of cross-border healthcare provision due to the presence of social, natural, cultural and geographical conditions,[105] there is clear evidence that the demand for cross-border healthcare is not limited to regions with shared frontiers, for example cooperation between hospitals in Malta and the UK.[106] Therefore, a comprehensive approach to regulation of cooperation between national healthcare systems is required to accommodate various patterns of patient mobility on a smaller or larger scale, both in terms of numbers and geographical location.

Moreover, the experience of cross-border cooperation in healthcare provision shows that, while establishing effective mechanisms of interaction between Member States through concluding bilateral or network agreements can be very successful, it may be costly and time consuming. For example, the INTERREG Programme run by the Commission in 1992–2006 to create a cross-border network of five hospitals and ten healthcare insurers in the Meuse-Rhine region could not be feasible or sustainable without additional funding.[107] In particular, the cost of creation of networks involves several stages, beginning with building alliances between hospitals, comprehensive documentation of existing levels and future possibilities for cross-border healthcare, as well as documentation of similarities and differences in health insurance schemes, regulation, financing and quality of treatment. The required scale of support from the EU may be significant to ensure success, as exemplified by the Puigcerda hospital, a product of cooperation between France and Spain financed at the rate of 60 per cent by the European structural funds.[108]

Effective cooperation supported by the Commission can create a network of cross-border healthcare without the element of antagonism, either horizontally between national healthcare systems, or vertically between the national and Union levels. Such

---

[104] Rec 49.

[105] For examples of cooperation in cross-border regions see M Rozenmöller et al, *Patient Mobility in the European Union. Learning From Experience* (The European Observatory on Health Systems and Policies 2006).

[106] N Azzopardi Muscat et al, 'Sharing Capacity – Malta and the United Kingdom', in *Patient Mobility in the European Union*, above note 105, at 123.

[107] See e-Business Market W@tch Case Study 'Cross-border cooperation for healthcare provision in Euregio Meuse-Rhine', 2004. http://ec.europa.eu/enterprise/archives/e-business-watch/studies/case_studies/health.htm.

[108] *Report on the cross-border delegation to France and Spain* 29–31 October 2012. www.europarl.europa.eu/document/activities/cont/201406/20140624ATT85766/20140624ATT85766EN.pdf.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

networks can be particularly efficient when they develop beyond the basic mechanisms of ad hoc transactions of cost reimbursement between competent authorities and healthcare providers to create advanced, long-term strategic and transformational partnerships.[109] Moreover, the effective networks should involve a broader spectrum of actors and stakeholders, such as hospitals, health insurance funds, patient organisations, doctors, Public Health Services, and health policy-makers and administrators. As a result, the perception of cross-border healthcare as a one-sided, wasteful outsourcing can be transformed into cooperation where the benefits outweigh the costs of developing and managing the healthcare services in house. For example, health insurers can become interested in contributing to expensive medical equipment in other participating countries, which their insured persons can then access for treatment.[110] Therefore, it is important that the role of the Commission in fostering cooperation between Member States under Article 10 of the Directive is not limited to encouragement but is conducted within the framework of a coherent policy on cross-border healthcare involving specific instruments of EU public health policy under Title XIV of the TFEU and EU structural policy under Title XVIII of the TFEU.

The Directive provisions on European Reference Networks are more developed and involve detailed regulation through delegated decisions[111] that provide a formal platform at EU level for construction of cross-border healthcare partnerships. Cooperation through the Networks can be an effective way of delivering affordable, high-quality and cost-effective cross-border healthcare. The important benefit of participation in the networks for the healthcare providers is better positioning for access to EU funding programmes. In particular, structural funds can be used to create European Reference Networks.[112] Within the framework of the EU health policy, the Third Health programme 2014–2020 has a specific target of funding health initiatives, including European Reference Networks. The budget of EUR 449.4 million has been allocated to cooperation projects at EU level to support actions and initiatives jointly undertaken by Member States' health authorities. At the moment, the Commission envisages establishment of between 20 and 30 European Reference Networks in total.

But on the other hand, the current regulation of European Reference Networks limits their potential as an all-encompassing model of facilitation of cross-border healthcare. The objective of European Reference Networks is to bring together highly specialised healthcare providers in different Member States to provide healthcare to patients with

---

[109] See B Kedia and S Lahiri, 'International Outsourcing of Services: A Partnership Model' (2007) 13 *Journal of International Management* 22–37.

[110] Ibid.

[111] European Commission, *Delegated Decision of 10 March 2014 setting out criteria and conditions that European Reference Networks and healthcare providers wishing to join a European Reference Network must fulfil* [2014] OJ L 147/71; European Commission, *Implementing Decision of 10 March 2014 setting out criteria for establishing and evaluating European Reference Networks and their Members and for the exchange of information and expertise on establishing and evaluating such Networks* [2014] OJ L 147/79.

[112] For analysis of European Reference Networks as a new governance mechanism see T Hervey, 'Cooperation Between Health Care Authorities in the Proposed Directive on Patients' Rights in Cross-Border Healthcare', in JW van de Gronden, E Szyszczak, U Neerdaard and M Krajewski (eds), *Health Care and EU Law* (Springer 2011) 161–190.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

conditions that require a high concentration of resources and expertise, in particular in the area of rare diseases. This area is rightly considered to be of primary relevance in terms of the need for access to treatment in another Member State. Yet, the amount of funding resources is limited, and the current requirements to be met for membership of the European Reference Network are rather difficult to fulfil. To begin with, each Network should involve at least ten hospitals/specialised centres from at least eight EU Member States. Therefore, not all current or proposed cooperation agreements between Member States on a smaller scale could be formalised as European Reference Networks. Also, the shortcoming of European Reference Networks as a blueprint for facilitation of cross-border healthcare provision on a broader scale is the lack of involvement of insurers. All in all, the current regulation of cooperation in the matters of cross-border healthcare is more organically linked to EU healthcare policy, rather than opening up the market of healthcare services. Therefore, facilitation at the EU level of access to cross-border healthcare services is limited to targeted areas and, otherwise, left to the Member States.

Cooperation between national health systems in matters of access to cross-border healthcare services on a large scale requires a comprehensive basis in the Treaty provisions on EU healthcare policy. The Union support of cooperation between national healthcare systems can be built on the basis of Article 168(1) TFEU, which asserts that a high level of human health protection must be ensured in the definition and implementation of all Union policies and activities. In particular, Article 168(2) TFEU provides for encouragement of cooperation between Member States and Union support for their action in healthcare matters. Encouragement of cooperation between Member States to improve complementarity of their health services in cross-border areas is of a particular pertinence to cross-border patient mobility. Yet, again, the focus on frontier regions falls short of a comprehensive, pan-European vision of patient mobility and cooperation between national healthcare systems in the EU. The transformation of cross-border healthcare from reimbursement transactions to cooperation partnerships can start with frontier regions, but only a comprehensive variable network of cooperation can provide a solution to the tension between cross-border patient mobility and the national healthcare solidarity.

Finally, provision of clear frameworks and mechanisms of cooperation with the support of EU institutions is particularly important in order to avoid problems that were identified in the early stages of application of case law of the Court on Article 56 TFEU. In particular, it is essential that the exercise of individual rights of patients regarding access to healthcare in another Member State is not compromised by instability or inefficiency of cooperation agreements that are concluded under political pressure or include unrealistic expectations from the parties which makes them non-viable.[113]

[113] For example, agreements between the English NHS and Belgian hospitals signed in 2003. See IA Glinos et al, 'Cross-border Contracted Care in Belgian Hospitals', in *Patient Mobility in the European Union*, above note 105, 101–103.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

V. CONCLUSION

The paradigm shift in the regulation of cross-border patient mobility is important in the wide context of sustainability of the European model of social solidarity as a 'multi-level welfare system'.[114] The current regulation of patient mobility is trapped in the dilemma of achieving patient mobility without encouraging treatment outside the Member State of affiliation, which stems from the clash between the interests of individual patients and national healthcare systems in the process of redistribution of financial burden and consequent renegotiation of the national healthcare contract. Intervention of EU law into the national healthcare systems through negative harmonisation can balance the interests of the individual patients and the national solidaristic community to a certain extent. However, the potential of this method of regulation is limited because it reasserts the antagonistic aspect of this relationship. The focus of negative harmonisation on the individual rights of mobile patients, as cross-border service recipients, redefines the conditions of their membership in the national solidaristic community and enhances the quality of this membership at the expense of other members of the national community. Although diffuse solidarity in the national welfare state is not based on reciprocity as equivalence,[115] to paraphrase Barnard, those who are footing the bill without seeing benefits for the wider national solidaristic community[116] can contest the European intervention into the provision of healthcare and, by implication, reject the wider project of European integration.[117] Moreover, the antagonistic and individualistic paradigm of regulation of cross-border healthcare undermines the national solidarity bond and leads to 'negative des-identification'[118] between patients who exercise their rights as cross-border healthcare recipients and other members of the national solidaristic community.

The individual and collective interests can be brought together by the regulation which transforms cross-border healthcare from reimbursement transactions to cooperation partnerships. Some basis for this change is already laid down in Directive 2011/24 with regard to European Reference Networks, which help to pull together resources of the Member States in the areas at the forefront of health provision. Raising awareness of the benefits of cross-border cooperation between national healthcare

---

[114] The term is borrowed from M Dougan and E Spaventa, '"Wish You Weren't Here …" New Models of Social Solidarity in the European Union', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 181–218. See also T Faist, 'Social Citizenship in the European Union: Nested Membership' (200) 39 *Journal of Common Market Studies* 37.

[115] See AP van der Mei, *Free Movement of Persons within the European Community: Cross-Border Access To Public Benefits* (Hart Publishing 2003) ch1.

[116] C Barnard, 'EU Citizenship and the Principle of Solidarity', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law* (Hart Publishing 2005) 157–180.

[117] See also M Dougan, 'The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon', in U Neergaard et al (eds), *Integrating Welfare Functions into EU Law. From Rome to Lisbon* (DJØF Publishing 2009) 187 ff.

[118] See A Somek, 'Solidarity Decomposed: Being and Time in European Citizenship' (2007) 32 *European Law Review* 787–818.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

authorities, even on a limited scale in targeted areas, can help dispel the negative perception of cross-border patient mobility among the general public. Yet the current conditions of participation will leave many potential applicants outside of this framework of cooperation and, although the limited scope of EU action is justifiable from the vantage point of financial and health priorities, a more flexible and comprehensive approach to regulation of cooperation between national healthcare authorities should be encouraged.

Cooperation and partnerships between healthcare authorities can trigger a paradigm shift by facilitating patient mobility in the EU without creating conflict between patients and the national solidaristic community. At the same time, the importance of individual rights of patients to access healthcare in another Member State under social security coordination regulations and Article 56 TFEU, irrespective of existence or efficiency of such mechanisms, should not be underestimated. The individual entitlements provide an incentive to improve provision of healthcare at the national level and utilise to that effect the opportunities offered by the EU provisions on cross-border patient mobility with regard to sharing capacities between healthcare authorities.

BIBLIOGRAPHY

Azzopardi Muscat, N et al. (2006), 'Sharing Capacity – Malta and the United Kingdom', in M Rosenmöller, M McKee and R Baeten (eds), *Patient Mobility in the European Union: Learning from Experience*, Copenhagen: WHO Regional Office for Europe, 119–136.

Barnard, C (2005), 'EU Citizenship and the Principle of Solidarity', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law*, Oxford: Hart Publishing, 157 ff.

Cygan, A (2008), 'Public Healthcare in the European Union: Still a Service of General Interest?' *International Comparative Law Quarterly* **57** 529–560.

De La Rosa, S (2012), 'The Directive on Cross-border Healthcare or the Art of Codifying Complex Case Law' *CMLR* **49** 15–46.

Dougan, M (2009), 'The Spatial Restructuring of National Welfare States within the European Union: The Contribution of Union Citizenship and the Relevance of the Treaty of Lisbon', in U Neergaard et al. (eds), *Integrating Welfare Functions into EU Law. From Rome to Lisbon*, Copenhagen: DJØF Publishing, 187.

Dougan, M and E Spaventa (2005), '"Wish You Weren't Here…" New Models of Social Solidarity in the European Union', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law*, Oxford: Hart Publishing, 181.

Esping-Andersen, G (1990), *The Three Worlds of Welfare Capitalism*, Cambridge: John Wiley and Sons.

Esping-Andersen, G (1996), 'After the Golden Age? Welfare State Dilemmas in a Global Economy', in G Esping-Andersen (ed), *Welfare States in Transition. National Adaptations in Global Economies*, London: Sage Publications.

Faist, T (2001), 'Social Citizenship in the European Union: Nested Membership' *Journal of Common Market Studies* **39** 37.

Giubboni, S (2011), 'Social Europe After the Lisbon Treaty. Some Sceptical Remarks' *European Journal of Social Law* **4** 244.

Glinos, IA et al (2006), 'Cross-border Contracted Care in Belgian Hospitals', in M Rosenmöller, M McKee and R Baeten (eds), *Patient Mobility in the European Union: Learning from Experience*, Copenhagen: WHO Regional Office for Europe.

Heise, A and H Lierse (2011), 'The Effects of European Austerity Programmes on Social Security Systems', *Modern Economy* **2** 498–513.

Hervey, T (2000), 'Social Security: The European Union Dimension', in N Harris (ed), *Social Security Law in Context*, Oxford: Oxford University Press, 231.

Hervey, T (2000), 'Social Solidarity: A Buttress against Internal Market Law?', in J Shaw (ed), *Social Law and Policy in an Evolving European Union*, Oxford: Hart Publishing.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

Hervey, T (2010), 'The Impact of European Union Law on the Health Care Sector: Institutional Overview', *Eurohealth* **16**(4) 5–7.
Hervey, T (2011), 'Cooperation Between Health Care Authorities in the Proposed Directive on Patients' Rights in Cross-Border Healthcare', in J van de Gronden, E Szyszczak, U Neerdaard and M Krajewski (eds), *Health Care and EU Law*, Berlin: Springer, 161–190.
Jorens, Y and JP Lhernould (2013), *European Report 2013.* Project DG EMPL/B/4-VC/2012/1110, Ghent: trESS.
Kedia, B and S Lahiri (2007), 'International Outsourcing of Services: A Partnership Model', *Journal of International Management* **13** 22–37.
Koutrakos, P (2005), 'Healthcare as an Economic Service', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law*, Oxford: Hart Publishing, 105.
Montgomery, J (2005), 'Impact of European Union Law on English Healthcare Law', in E Spaventa and M Dougan (eds), *Social Welfare and EU Law*, Oxford: Hart Publishing 145.
Neville, S and J Parker (2014), 'Hospitals to be Paid for Reporting Treatment of EU Patients', *Financial Times*, 17 July.
Newdick, C (2006), 'Citizenship, Free Movement and Health Care: Cementing Individual Rights by Corroding Social Solidarity' *CMLRev* **43** 1645–1668.
Newdick, C (2011), 'Disrupting the Community: Saving Public Health Ethics from the EU Internal Market', in JW Van de Gronden et al. (eds), *Health Care and EU Law*, The Hague: Asser Press, 211 ff.
Pascalia, V (2009), 'Co-ordination of Social Security in the European Union: An Overview of Recent Case Law', *CMLRev* **44**, 1177.
Pennings, F (2015), *European Social Security Law*, 6th edn, Antwerp: Intersentia.
Pennings, F (2011), 'The Cross-Border Health Care Directive: More Free Movement for Citizens and More Coherent EU Law?' *European Journal of Social Security* **13** 424–452.
Plimmer, G (2014), **'**Private Groups Invited to Help NHS Buy Services', *Financial Times*, 25 February.
Rozenmöller, M et al (2006), *Patient Mobility in the European Union. Learning From Experience*, The European Observatory on Health Systems and Policies.
Somek, A (2007), 'Solidarity Decomposed: Being and Time in European Citizenship' *European Law Review* **32** 787–818.
Szyszczak, E (2013), 'Putting the Market into the Social: Be Careful What We Wish For', in J Fejø et al. (eds), *In Honour of Ruth Nielsen*, Copenhagen: Jurist-OG Øconomforbundets Forlag, 357 ff.
Taylor-Gooby, P (1996), 'The Response of Government: Fragile Convergence?', in V George and P Taylor-Gooby (eds), *European Welfare Policy. Squaring the Welfare Circle*, London: Macmillan Press Ltd, 204 ff.
Van der Mei, AP (2003), *Free Movement of Persons within the European Community: Cross-Border Access To Public Benefits*, Oxford: Hart Publishing.
Van der Mei, AP (2011), 'Commentary on *Elchinov*' *Common Market Law Review* **48** 1297–1311.
Van Overmeiren, F (ed) (2013), *Impact Assessment of the Revision of Selected Provisions of Regulations 883/2004 and 987/2009. Analytical Study 2013. Project DG EMPL/B/4 – VC/2012/1110*, Ghent: TrESS.
Weale, A and S Clarke (2011), 'High Quality, Comprehensive and Without Barriers to Access? The Future of Healthcare in Europe', London: UCL, www.ucl.ac.uk/european-institute/analysis-publications/publications/FHE_FINAL_online.pdf.
White, R (1999), *EC Social Security Law*, London: Longman.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:07:45PM
via University College London (UCL)

20. The EU promotion of social protection in the world

Marius Olivier

I. INTRODUCTION

This chapter essentially focuses on the role of the EU in the promotion of social security in the developing world, from a generic perspective, with some application to the sub-Saharan context. The first section reflects on the underlying legal and policy framework, informed largely by EU and Member States' competencies in the area of development cooperation and with a focus on social protection. The second section contains a high-level critical discussion of salient issues: the overall legal, policy and institutional framework; current aid modalities; and the envisaged redirection/reform of support of social protection in the developing world, at least from the perspective of the EU itself (primarily via the European Commission). Challenges in these domains as far as they relate to the EU's support and promotion of social protection in the developing world are highlighted, with specific reference to:

(a) the division of competencies between the EU and EU Member States according to EU institutional law;
(b) limitations flowing from the restricted legal and institutional as well as policy framework and mandate informing the EU's engagement with social protection in the developing world;
(c) the failure to regard and treat social protection also as a separate sector, alongside its close interrelationship and integration with other sectors;
(d) several problems of approach and focus, relating in particular to:
    (i) the often donor-driven nature of engagement, which negates (national) government ownership and participation, and militates against national takeover of programmes introduced and initially run by the EU;
    (ii) short-term financial involvement in costly programmes (eg funded social transfer programmes), without heeding longer-term social protection development needs;
    (iii) the (at times) (over)emphasis on social (cash) transfers;
    (iv) conflicting policy objectives and a lack of coherence with Europe's other (non-development) policies; and
    (v) the lack of sufficient coordination and harmonised approaches, firstly between the European Commission and Member States and, secondly, among the diverse donor community/development partners.

Given the challenges outlined above, in the third section of the chapter the need for revision, reorientation and reform is critically evaluated. The evaluation also deals with

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

the question whether the more recent social protection-focused instruments emanating from the European Commission provide a sufficient response to these challenges.

II. UNDERLYING LEGAL AND POLICY FRAMEWORK

The European Union involvement in social protection in the developing world is informed by a range of core frameworks and developments.[1] Firstly, EU support for social protection programming for the period 2014–2020 is being channelled through the eleventh round of European Development Funds (EDF),[2] referred to in EC Regulation 1905/2006 on establishing a financing instrument for development cooperation.[3] Secondly, relations between the EU and the third countries or regions are regulated by bilateral agreements, invariably in the form of partnership agreements. In the case of African, Caribbean and Pacific (ACP) countries, the ACP-EU Convention[4] signed in Cotonou on 23 June 2000 is the governing instrument. The agreement focuses on social and economic development, and the support of government and non-state actors in fighting poverty, promoting growth, delivering social services and fostering democracy and good governance.[5] In the third instance, the EU also subscribes to the channelling of support via an Aid Effectiveness Framework, based on the Paris Declaration on Aid Effectiveness of 2005.[6] The key guiding principles articulated in this regard include:

- ownership of development strategies by the national government concerned;
- alignment of aid by development partners in line with these strategies;
- harmonisation and coordination of efforts;

---

[1] See M Olivier, F Andrianarison and M McLaughlin, *Study on Social Protection in Sub-Saharan Africa* (Report submitted to the European Commission) (European Commission 2013) 38–39.

[2] The EDF is a programme for the development of ACP (African, Caribbean and Pacific Group of States) and overseas countries. Its global budget for the 2014–2020 period amounts to 31,589 billion euro: www.welcomeurope.com/european-funds/edf-11th-european-development-fund-2014-2020-859+759.html#tab=onglet_details. EDF funds are split between envelope A, with an indicative allocation, and the smaller envelope B, which is held in reserve for emergency situations and can reach vulnerable populations through humanitarian or short-term assistance. Envelope A funds are typically administered through budget support for indicative programming. It is important to note that social protection (SP) support in sub-Saharan Africa countries can emanate from either Envelope A or B.

[3] [2006] OJ L 378/41.

[4] Partnership Agreement ACP-EC (2000), as revised.

[5] Article 25§3 states that 'cooperation shall promote and support the development and implementation of policies and of systems of social protection and security in order to enhance social cohesion and to promote self-help and community solidarity'. As a result of the 2010 second revision of the Agreement, a specific provision was added, relating to improving health systems, including supporting safety nets.

[6] See also the Accra Agenda for Action of 2008: www.oecd.org/dac/effectiveness/34428351.pdf.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

- managing for and measuring results; and
- mutual accountability.

Fourthly, EU interventions are meant to be country specific and context sensitive, bearing in mind specific country characteristics such as the historical background, economic performance, geographic situation, and the social, judicial and political environments.[7] The particular vulnerability profile of a specific country is important, as is evident from the focused support given in the event of food crises and in post-conflict scenarios. Finally, the *European Report on Development* of 2010[8] has played an important part in highlighting social protection challenges, particularly in sub-Saharan Africa, while two 2011–2012 EU instruments, ie the EU *Agenda for Change*[9] and EC *Communication on Social Protection in European Union Development Cooperation*[10] provide a framework and crucial direction for future EU involvement in both development coordination generally and social protection specifically (see below). In fact, several preceding EU frameworks and instruments are indicative of the EU support for development coordination and social protection initiatives in third countries, including the *European Consensus on Development*,[11] the EU's commitment to the *Social Dimension of Globalisation*[12] and the EC *Communication on Tax and Development*.[13]

And yet, despite this comprehensive framework, the EU's engagement with social protection in the developing world is not without its particular challenges. These challenges among others relate to the lack in practice of a sufficient focus on social protection needs experienced by developing countries in certain instances, the often imbalanced context of aid rendered to developing countries, the limited basis for aligning social protection support with national priorities, and fragmentation and duplication of institutions, operations and interventions. Before touching on these and other matters, it is necessary to reflect on the link between social protection and EU development cooperation/external action, as well as the related question of EU institutional and Member State competencies in these areas, and associated problems.

---

[7] See S Devereux and R Cipryk, *Social Protection in Sub-Saharan Africa: A Regional Review* (IDS 2009) 5–9.

[8] As noted in the *European Report on Development*, social protection '… complements and leverages other interventions, thus providing a much needed missing piece to the development puzzle': *European Report on Development*, *Social Protection for Inclusive Development: A New Perspective in EU Co-operation with Africa* (European Communities and European University Institute 2010) 19.

[9] European Commission, *Increasing the Impact of EU Development Policy: An Agenda for Change* [2011] COM 637 final (European Commission 2011). See also Council Conclusions 9316/12.

[10] European Commission, *Social Protection in European Union Development Cooperation,* [2012] COM (European Commission 2012).

[11] Joint Statement by the European Parliament, Council and Commission [2006] OJ C46/1.

[12] European Commission, *The Social Dimension of Globalisation – the EU's Policy Contribution on Extending the Benefits to All* [2004] COM 383 final (European Commission 2004).

[13] European Commission, *Communication on Tax and Development* [2010] COM 163, Council Conclusions 10349/10. See *European Report on Development* (2010) 38 for references in other EU instruments.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

III. COMPETENCIES, COORDINATION AND COMPLEMENTARITY

III.i Constitutional Framework

Constitutionally speaking, EU support for social protection in developing countries finds its origin in EU treaty provisions on development cooperation. The competencies given to the institutions at European level and to Member States to act in this area are relatively recent, dating back to 1993. Before, case law of the European Court of Justice confirmed that trade agreements or measures, stemming from matters of commercial policy, could logically link to development of third countries (eg, commodities agreements which regulated trade agreements drafted in the framework of UNCTAD (United Nations Conference on Trade and Development)).[14] In addition to a broad understanding of development policy, the Court also confirmed the shared or complementary nature of competencies in this area, involving not only various EU institutions, but also Member States.[15] Furthermore, the ECJ upheld the principle, subsequently added by the Treaty of Lisbon, that respect for human rights, as an objective of development policy, required that such policy be made subject to the protection of human rights.[16] To some extent these judgments also reflect the different stages and evolutionary nature of development cooperation agreements: from covering Community aid, to economic cooperation, to a consideration of the social context of developing countries and commercial relations.[17]

Currently, following the amendments introduced by the Treaty of Lisbon, the Treaty on European Union (TEU) makes it clear that the Union's external action must be guided by the principles which have inspired its own creation, development and enlargement, and which it seeks to advance in the wider world: namely democracy, the rule of law, the universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law.[18] Article 21(2)(d) enjoins the Union to define and pursue common policies and actions, and to work for a high degree of cooperation in all fields of international relations, in order to foster the sustainable economic, social and environmental development of developing countries, with the primary aim of eradicating poverty. Policy consistency is in

---

[14] *Opinion 1/78 re International Agreement on Natural Rubber* [1979] ECR 2871; see also Case 45/86 *Commission v Council* [1987] ECR 1493; P Eeckhout, *EU External Relations Law*, 2nd edn (Oxford University Press 2011) 128.

[15] Joined Cases C-181 and 248/91 *Parliament v Council and Commission* [1993] ECR I-3685; Case C-316/91 *Parliament v Council* [1994] ECR I-625; Case C-268/94 *Portugal v Council* [1996] ECR I-6177; Case C-403/05 *European Parliament v Commission* [2007] ECR I-9045; Eeckhout, note 14, 128–139.

[16] Case C-268/94 *Portugal v Council* [1996] ECR I-6177; Eeckhout, note 15, 135.

[17] Eeckhout, n 14, 131 and authority referred to there.

[18] Article 21(1) TEU.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

particular foreseen: the Union is required to ensure consistency between the different areas of its external action and between these and its other policies.[19]

The Treaty on the Functioning of the European Union (TFEU), in the title dealing with categories and areas of Union competence, stipulates that, in the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy, adding, however, that the exercise of that competence must not result in Member States being prevented from exercising theirs.[20] In the part concerning cooperation with third countries, and in particular development cooperation, the TFEU confirms that Union policy in this field has to be conducted within the framework of the principles and objectives of the Union's external action (ie as contained in Article 21 TEU), referred to above.[21] It further stipulates that Union development cooperation policy must have as its primary objective the reduction and, in the long term, the eradication of poverty.[22] The TFEU stresses that the Union's development cooperation policy and that of the Member States *complement* and reinforce each other,[23] and indicates that both the Union and Member States have the competence to conclude agreements to achieve the development cooperation objectives of the TEU and TFEU.[24] Article 210(1) of the TFEU enjoins the Union and Member States, in order to promote the complementarity and efficiency of their action, to *coordinate* their policies on development cooperation and to consult each other on their aid programmes. They may undertake joint action,[25] while the Commission may take any useful initiative to promote the coordination referred to in this article.[26] Importantly, the TFEU imposes an obligation on European Union Member States to *cooperate* with third countries and with the competent international organisations, within the respective spheres of their competence in the area of development cooperation.[27]

III.ii Achievements, Shortcomings and Challenges

The application of the EU constitutionally prescribed coordination and complementarity model in the field of development cooperation has had some but limited impact. Important institutional arrangements, mostly introduced during the Prodi Commission era (although some are of more recent origin), have helped to streamline interventions to the benefit of both European Union actors (ie Union institutions and Member States) and third countries. One such arrangement has been the establishment of EuropeAid, operating under the control of the recently instituted Director-General Development and Cooperation (DG DEVCO) and responsible for overseeing, subject to some

[19] Article 21(3) TEU: The Council and the Commission, assisted by the High Representative of the Union for Foreign Affairs and Security Policy, have to ensure that consistency and must cooperate to that effect.

[20] Article 4(4) TFEU.

[21] Article 208(1) TFEU.

[22] *Ibid*.

[23] *Ibid*.

[24] Article 209(2) TFEU.

[25] Article 210(1) TFEU.

[26] Article 210(2) TFEU.

[27] Article 211 TFEU.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

exceptions, the external aid programmes in all third countries.[28] A second arrangement concerns the introduction of Country Strategy Papers (CSPs), setting a strategic framework for the key priorities in a given country or region and covering both development assistance and other EC activities (ie a policy mix). Each CSP contains a National Indicative Programme, indicating the focal areas for the spending of EU resources. These instruments provide for multi-annual programming of EU aid to developing countries and are developed in collaboration with Member States, national governments, other donors and civil society representatives in the recipient country.[29] In terms of the third arrangement, responsibility for the management of external aid has been devolved to the EU Delegations present in developing countries.[30] Also, several European Union policy documents have been developed since the turn of the century, providing a framework for development coordination including, among other things, reference to social protection-related matters, and stressing the need for coordination and complementarity. These include the *Statement on Development Policy* in 2000, the *Policy Coherence for Development* initiative,[31] the *European Consensus on Development* and other instruments noted above. In fact, the very development of the *European Consensus* reflects the spirit of cooperation and coordination among the European institutions, as this was agreed by the Parliament, Commission, Council and the Member States. In addition, in an attempt to strengthen complementarity of action, a *Code of Conduct on Complementarity and Division of Labour in Development Policy* was developed in 2007, and has been endorsed by the Council and representatives of the Member States.[32]

And yet, despite all of the above interventions, as has been noted in both commentary[33] and EU instruments,[34] fragmentation, duplication and proliferation have not diminished, but in fact increased. The EC's *Agenda for Change* comments that 'Fragmentation and proliferation of aid is still widespread and even increasing, despite considerable recent efforts to coordinate and harmonise donor activities. The EU must take a more active leadership role, as mandated by the Lisbon Treaty, and put forward proposals to make European aid more effective.'[35] From both an EU and wider donor actor perspective this could be explained with reference to the fact that effective

---

[28] J Orbie and H Versluys, 'The European Union's International Development Policy: Leading and Benevolent', in J Orbie (ed), *Europe's Global Role – External Policies of the European Union* (Ashgate 2008) 70.

[29] *Ibid*, 70–71. Mention is also made of the establishment of a new Inter-service Quality Support Group, situated within DG DEVCO but reporting directly to all Commissioners dealing with external relations, to contribute to improvements in development aid programming, and to ensure quality control and policy coherence in the preparation of the CSPs.

[30] *Ibid* 72.

[31] European Commission, *Commission staff working document: Policy Coherence for Development Work Programme 2010–2013* (European Commission 2010).

[32] Orbie and Versluys, note 28, 73–74.

[33] *Ibid*, 72–73; *European Report on Development* (2010) 110–111.

[34] Among others, European Commission *Agenda for Change*, para 5.

[35] *Ibid*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

coordination/donor harmonisation mechanisms are in place in some developing countries but not in others;[36] that social protection which until recently was not a priority area for development cooperation has increasingly attracted donor attention as the international, continental/regional and domestic focus on appropriate social protection regimes for developing countries has intensified; and that development partners tend to continue their involvement in social protection in the same niche areas as before, given their mandate and intended agenda, and regardless of whether this is aligned with the programmes of other donors or indeed the most appropriate intervention, and one that is sought by the country concerned. Additional considerations apply in the case of some EU Member States, including historical ties with some developing countries and a preference to cooperate with international organisations that have had a strong and specialised involvement in social protection interventions as regards developing countries (such as the World Bank, ILO and Unicef) rather than the EU.[37] This much is also evident from the very existence of and basis for the European Development Fund's funding mechanism: it essentially remains an inter-governmental funding arrangement subject to its own financial rules, as EU Member States have until now refused its inclusion within the EU budget and the control thereof by the European Parliament.[38] The implication is that the EU is constrained to act as one and to speak with a collective voice when it comes to its social protection involvement in developing countries – despite the significant size of the EU involvement in official development assistance.[39]

And yet, one would like to think that greater coordination and enhanced complementarity will and must become more of a concrete reality. This, it is suggested, is gently prompted by the strong emphasis placed on these matters in several already mentioned recent and important EU documents and instruments (including the added constitutional provisions reflected on above); measures introduced to ensure improved streamlining, such as the *Policy Coherence for Development (PCD)*, the *Code of Conduct on Complementarity and Division of Labour in Development Policy* and the newly established mechanism to fast-track implementation of the Code,[40] as well as EU Joint Multi-annual Programming; and the establishment by the Treaty of Lisbon of the European External Action Service, meant to ensure that all the different activities that the EU performs abroad are consistent and effective,[41] and to 'help strengthen the

[36] As has explicitly been noted in the sub-Saharan context: see *European Report on Development* (2010) 102; Olivier, Andrianarison and McLaughlin, note 1, 40.

[37] Orbie and Versluys, note 28, 68–69.

[38] *Ibid*, 74.

[39] *European Report on Development* (2011) 117.

[40] The Fast Track Initiative on Division of Labour (FTI-DoL) aims at identifying problems with implementing the Code and proposing a roadmap to remedy them: 'The FTI-DoL aims at accelerating the implementation of the EU Code of Conduct in selected pilot partner countries. Within the framework of the initiative, EU lead and supporting facilitators have been identified for each partner country. The EU Fast Track Initiative is being implemented in 32 partner countries, 18 of which are in Sub-Saharan Africa', see *European Report on Development* (2011) 115 note 517); Council Conclusions on an Operational Framework on Aid Effectiveness, 17 May 2009.

[41] See www.eeas.europa.eu/what_we_do/index_en.htm.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

European Union on the global stage, give it more profile, and enable it to project its interests and values more efficiently'.[42] Steps such as these are required to enable the European Union institutions and the Member States to collectively add a distinct value to the rendering of development assistance, in particular in the area of social protection; and for the EU to move beyond its role as implementer or development actor, and to take up its role as coordinator of European development policies and norm-setter.[43] The coordinating role of the EU is already visible in areas such as the coordination of Member State ODA (Overseas Development Assistance) levels. However, there is scope for an enhanced and distinct EU role:[44]

> EU development policy, it is argued, has distinct advantages over Member States' national development programmes, as the EU offers a global presence, ensures policy coherence (particularly between trade and development), plays a crucial role in facilitating coordination and harmonisation among donors, promotes best practices in development across the EU, benefits from economies of scale as a deliverer of aid, and possesses particular experience in the areas of good governance, democracy promotion, and the participation of civil society.

In addition to this, according to Orbie and Versluys, the mere existence of the EU provides yet another added value in the development sphere: the EC is an institution besides and above the Member States, which can present itself as a new and neutral actor without connotations with the colonial past, thereby linking up with the very identity of Europe as a civilian power.[45]

Conflicting policy objectives in the EU context constitute another area where a lack of coordination is discernible. We turn to this as part of the next discussion.

IV. POLICY OBJECTIVES: AN INSUFFICIENT FOCUS ON SOCIAL PROTECTION

According to Article 208(1) TFEU, the primary objective of Union development cooperation policy is the reduction and, in the long term, the eradication of poverty. Similarly, the *European Consensus on Development* indicates the eradication of poverty in the context of sustainable development, including pursuit of the Millennium Development Goals, as the primary and overarching objective of EU development cooperation.[46] Over the years though, the potential impact of this key objective for the area of social protection has been qualified, if not diluted, by several factors. Firstly, a substantial number of objectives and activities have been added. In fact, the *European Consensus on Development* suggests that areas of EU comparative advantage include water, energy, agriculture, social cohesion and employment. EU thematic budget lines have also (initially) added to this list issues such as poverty diseases, reproductive

---

[42] See www.eeas.europa.eu/background/origins-of-the-european-external-action-service/index_en.htm.

[43] Orbie and Versluys, note 28, 85–87.

[44] *Ibid*, 74–75.

[45] *Ibid*, 79.

[46] Para 5.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

health and food aid. However, problems of mainstreaming the ever-increasing list of development-oriented issues into European programmes, their adverse impact on local ownership and the administrative burden they impose have led to reduction of horizontal budget lines, although the core issue of accommodating social protection within the framework of multiple objectives remains.[47]

Secondly, other key principles have been indicated, often in the form of cross-cutting issues that have to be reflected in external action initiatives. Issues to be so mainstreamed and which have to form part of the political dialogue conducted by the Member States and the Union relate to the promotion of human rights, gender equality, democracy, good governance, children's rights and indigenous peoples, environmental sustainability and combating HIV/AIDS.[48] As discussed above, some of these issues are embedded as EU constitutional principles, endorsed by the Court of Justice, which must guide the Union's external action. As such, they constitute political conditionalities, also for the rendering of social protection support to developing countries. While the importance of these principles has to be acknowledged, there may be need to interrogate the method of their mainstreaming, given the fact that it is often the very developing countries most in need of comprehensive social protection support which lack proper accommodation of these principles. A fresh approach to this matter is perhaps also necessitated by the fact that the fast-changing landscape of donor support has brought role-players to the landscape who do not set these requirements as a condition for development cooperation.

Thirdly, social protection remains low on the list of priority areas of EU action in developing countries. Its weak position on the development agenda is matched by limited, though increasing concrete involvement in relative and comparative terms, despite the fact that this is an area which is high on the bi- and multilateral political agenda.[49] Again, reference can be made to the emphasis in the Cotonou Convention on the development and implementation of social protection and security policies and systems, including the improvement of health systems and supporting of safety nets.[50] And yet, especially at the overarching continental/regional levels, EU concrete action and funding instruments reflect little of this reality. For example, irrespective of the (limited) reference to social protection (and employment) in the framework of the Joint Africa-EU Strategy Partnership (JAES), funding instruments (including the most recent continental-level instrument, ie the Pan African Programme (PAP)) at this level do not capture the need for support of these important areas at the apex political level.

This raises the question whether social protection should not be identified as a separate sector for purposes of action and financial support. The EC *Communication on Social Protection*[51] indeed suggests that, in line with the *Agenda for Change*, social protection may be selected as one of the sectors for cooperation in individual country or regional programmes. This would help to prioritise social protection and secure funding and would improve coherence of the overall approach to social protection, as

47 Orbie and Versluys, note 28, 78–79.
48 Para 17 and para 101, *European Consensus on Development*.
49 *European Report on Development* (2011) 111, 115.
50 Article 25§3 Cotonou Convention.
51 Para 6.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

well as its integration within the wider development framework.[52] The problem though, at a country level, is that EU donors concentrate their commitment to active involvement in a maximum of three sectors, which may cause social protection to be excluded when hard choices regarding priorities have to be made. Nevertheless, aligning social protection with partner priorities at country level could indicate a way to deal with this matter – flowing from the provision in the *Code of Conduct on Complementarity and Division of Labour in Development Policy* that 'appreciation of what constitutes a sector should … match the definition of the partner country, that should have identified the sector as a priority in its poverty reduction strategy or equivalent'.[53] It also has to be borne in mind that the multi-dimensional role of social protection and the multi-sectoral nature of social protection interventions require that more than a mere sectoral approach may be warranted, given the context of what needs to be addressed in a concrete developing-country context.

Fourthly, there has been an evident shift away from development support, and also social protection support, from least developed countries (LDCs), among others fragile countries, to other countries, including middle-income countries (MICs) who may be less in need of such support. This development has been prompted by several considerations, among others foreign relations and security concerns. Described as the securitisation of European development policy, budgetary decisions have increasingly been influenced by pursuing security goals and concentrating attention on geostrategically important countries.[54] Also, the complexity of rendering assistance in environments which present themselves in less fortunate countries – with reference to the often dysfunctional governance, institutional and fiscal systems and structures obtaining in these countries – as well as the need to show results in a short period and the temptation to focus on social protection 'success stories' in more or less stable countries, have contributed to this phenomenon. It is clear that social protection involvement in contexts of fragility and limited domestic capacities calls for flexible and specially designed interventions requiring considerable inputs as well as long-term investment and engagement.[55] From a donor perspective, this has been acknowledged in the OECD (Organisation for Economic Co-operation and Development) guidelines pertaining to engagement with fragile states and situations.[56] Recent EC documents therefore stress the need to reverse the tendency and give priority and tailored attention to these neglected contexts.[57]

Finally, the policy objective theme also raises the issue of coherence with Europe's other (non-development) policies. The need for coherence in this area is accentuated by

---

[52] *European Report on Development* (2011) 116; Olivier, Andrianarison and McLaughin, note 1, 45.

[53] Guiding principle 1, *Code of Conduct on Complementarity and Division of Labour in Development Policy.*

[54] Orbie and Versluys, n 28, 81–82.

[55] See *European Report on Development* (2011) 103–106.

[56] Organisation for Economic Co-operation and Development (OECD) *Principles for Good International Engagement in Fragile States and Situations* (OECD 2007).

[57] See paras 20–22, 89–92 *European Consensus on Development*; para 7 *Communication on Social Protection*; para 7 *Code of Conduct on Complementarity and Division of Labour in Development Policy*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

the potentially detrimental impact of other EU policies on development in and the social protection context of developing countries. Examples abound. The common agricultural policy has been criticised for its adverse impact on local development and the livelihoods of the poor in developing countries: in terms of the common agricultural policy, the EU is required to dispose of surplus European products on the world market through the use of export subsidies on agricultural goods, while the EU market is protected from agricultural imports via tariff and non-tariff trade barriers imposed on developing countries attempting to increase their exports to the Union.[58] Similar undesirable external consequences have been noted in relation to the operation of the EU's Common Fisheries Policy.[59] It has also been suggested that trade reforms, in the name of globalisation, can cause a rise in informal employment (a general phenomenon in the majority of developing countries in Africa, for example) and the loss of formalised social protection support, requiring governments to develop and design alternative social protection mechanisms in the wake of severe fiscal constraints.[60] This has led the EC to issue a Communication including proposals to enhance *Policy Coherence for Development* in 2005. Policy Coherence for Development has indeed now been elevated to a constitutional obligation, as indicated: according to the TEU, the EU has to ensure consistency between the different areas of its external action and between these and its other policies,[61] while Article 208(1) of the TFEU requires the Union to take account of the objectives of development cooperation in the policies that it implements which are likely to affect developing countries. In terms of the provisions of the *European Consensus on Development*, the EU has to take account of the objectives of development cooperation in all policies that it implements which are likely to affect developing countries: to make this commitment a reality, the EU will strengthen Policy Coherence for Development procedures, instruments and mechanisms at all levels, and secure adequate resources and share best practice to further these aims.[62] The challenges in this area have been highlighted in the Council conclusions of 2013 on Policy Coherence for Development, and include the need for political dialogue at the highest level within the Union; close collaboration involving the Council, the Commission, the European External Action Service, the European Parliament, EU Delegations and Member States; dialogue with local stakeholders; the setting of political objectives; the need to measure Policy Coherence for Development and to develop appropriate methodologies and indicators; independent assessments; and a focus in the immediate future on five Policy Coherence for Development challenges: trade and finance, climate change, food security, migration, and security.[63]

---

58 Orbie and Versluys, n 28, 83–84.
59 *Ibid*.
60 *European Report on Development* (2011) 114.
61 Article 21(3) TEU.
62 Para 35, *European Consensus on Development*. See also para 110.
63 *Council conclusions on policy coherence for development* (Council 12 December 2013).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

V. MISALIGNED DONOR INTERVENTIONS: THE NEED TO BUILD PARTNERSHIP APPROACHES

A study on social protection in sub-Saharan Africa, recently completed for the EC, indicates that the EU subscribes to the channelling of support via the Aid Effectiveness Framework (AEF), based on the Paris Declaration on Aid Effectiveness. Support from the EC and EU Member States is therefore mostly aligned with jointly determined national priorities, with overall and sector/programme-specific allocations to particular countries. However, support appears to be fragmented in countries without aid harmonisation frameworks.[64] The study indicates that the EC and EU Member States are in fact providing support for a wide range of social protection programmes in sub-Saharan Africa. EC interventions range from social transfers payment support (including short-term safety nets), through access to basic social services to social protection policy reform. They support countries that are developing or reforming their social protection systems by providing funding and technical assistance, building capacities and engaging in political dialogue. The largest social protection programme supported by the EU is in Ethiopia, where it has provided close to €100m for the Productive Safety Net Programme (PSNP) for cash transfers to beneficiaries and for capacity building and technical assistance. But direct support to social protection elsewhere in sub-Saharan Africa is fairly sparse.[65]

According to the study, a perusal of social protection interventions in sub-Saharan Africa countries by the EC and EU Member States leaves one with the impression that, while there is general adherence to the principles of national engagement and ownership, several of the social transfer programmes supported by the EC and in particular EU Member States are effectively donor driven. The unreliability of donor support and the transient nature of funding (eg pilot projects) promote reluctance on the part of national governments to take over programmes. However, national ownership is necessary to ensure sustainability.[66] One of the main areas of concern appears to be the way in which the EC, EU Member States and other development partners are involved in essentially cash transfer initiatives, although this is indicative of a general approach to the rendering of social protection support, not only in sub-Saharan Africa, but also in many other developing countries and regions. These cash transfer initiatives have been described as fragmented, ad hoc and short term, due to mainly donor establishment and implementation. Consequently, the prospects for sustainability and scaling up of these programmes are generally poor, in view of national government resistance.[67] However, exceptions do exist in countries where governments take ownership of donor-driven initiatives – provided the required fiscal space can be found.[68]

---

[64] Olivier, Andrianarison and McLaughlin, note 1, 40.

[65] *Ibid*.

[66] *Ibid*, 40–41.

[67] M Niño-Zarazúa, A Barrientos, S Hickey and D Hulme, 'Social Protection in Sub-Saharan Africa: Getting the Politics Right' ([2011) 40 *World Development* 16–17.

[68] Olivier, Andrianarison and McLaughlin, note 1, 32.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

The 2010 *European Report on Development* has identified the challenges posed by this approach in the following terms:[69] 'As a result, the social protection concepts introduced by the donor community may not be appropriate to the local context and challenges.' According to Devereux and White:

> The dominance of international actors in designing, financing and even delivering protection in Africa has been responsible for certain biases in the types of programmes implemented and their scale, location and duration … these biases have inevitably resulted in the exclusion of other forms of social protection … In practice, social protection in Africa has become dominated by unconditional cash transfers, often projectised at sub-national level, typically financed by bilateral or multi-lateral donors and implemented by NGOs, and mostly located in anglophone countries.[70]

From the African side, Adesina argues that donor promotion of the social protection agenda is indeed often akin to a 'policy merchandising', whereby donors lobby (or 'bully') a 'captive audience' and push for self-serving solutions, undermining a wider vision of social protection in sub-Saharan Africa in the process.[71] Even the evidence from donors is considered problematic, as their research can be seen as 'self-interested', or 'often thin and suspect'.[72] The same report remarks that social transfers are seen as a cost-effective and pragmatic means to directly deliver resources to the poor: the small-scale pilot experiments are expected to provide persuasive evidence of the positive impact of such transfers, convincing governments to take over financing of the programmes and scale them up at the national level.[73] However,

> celebrated pilots have been successful in addressing poverty among targeted groups, but have typically not been adopted by governments or taken to scale. Donor-funded transfers rarely, if ever, graduate from donor-led small-scale evidence-building pilots with an expiry date to sustainable government-led national social provisioning schemes. Without denying their positive impact on some people's lives, externally driven pilots are thus quite problematic. While they allow for donor and non-governmental organisation (NGO) 'flag planting' and useful lessons, they tend to create 'temporary islands of access to internationally financed social welfare', at the cost of both ownership and sustainability.[74]

In fact, donor preference and prescription in the past led to what has been described as disagreements and misguided attempts not to establish programmes deemed appropriate by national governments: in the end these very programmes carried general popular support and proved to be successful in addressing major poverty dimensions.[75] Lack of national ownership of donor-led and -driven programmes has also been ascribed to the

---

[69] *European Report on Development* (2011) 101.

[70] S Devereux and P White, 'Social Protection in Africa: Evidence, Politics, and Rights, [2010] 2(3) *Poverty and Public Policy*, 53–77 at 55.

[71] J Adesina, *Rethinking the Social Protection Paradigm: Social Policy in Africa's Development*, Background paper for the *European Report on Development* (2010) 8.

[72] *Ibid*.

[73] *European Report on Development* (2011) 94.

[74] *Ibid*.

[75] Eg, the introduction by both Lesotho and Swaziland of an old-age social assistance grant: *European Report on Development* (2011) 100.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

inability and/or unwillingness on the part of governments to sustain such programmes, caused largely by 'donor faddism' (ie where a donor pushes a priority for several years only to drop it suddenly and move on to another) – thus, 'there exists a continued perception among some governments that social protection is just another development fad, and a reluctance to institute or support systems that may have to be dismantled if donor funds are withdrawn'.[76]

Plainly aware of these shortcomings, the 2012 EC *Communication for Social Protection* makes clear that the focus should be on nationally owned social protection policies and programmes, with provision made for fiscal space, capacity building, job creation, social justice and gender. With reference to the principle that effective and sustainable social protection should ultimately be based on internal rather than international wealth redistribution, the Communication indicates that the EU will support measures to develop effective, efficient, fair and sustainable tax systems,[77] according to the capacities of individual partner countries, in order to increase fiscal space to fund social protection. Finally, according to the Communication, establishing an appropriate legal and institutional framework is a key challenge for the provision of effective and efficient social protection coverage in sub-Saharan Africa. The EU should therefore continue to support partner countries through technical cooperation, to set up the strategic, policy, legal and institutional framework, based on their local analysis and priorities.

In general, it is suggested that a context-sensitive and country-specific perspective should be emphasised, which should ideally entail a holistic and integrated approach aimed not only at providing immediate, emergency or humanitarian support of a social protection nature where required, but also and in particular longer-term involvement in government-led programmes aimed at developing scaled-up social assistance and improved contributory-based schemes, while ensuring that these programmes promote self-sustainability, direct engagement in the labour market and, as far as possible, exit from dependency on social transfers alone.[78] This, it would seem, would require an approach whereby the leading role of national governments in devising, implementing and accounting for social protection interventions is recognised and respected, also in view of the accountability of these governments to their particular polities based on an implicit social contract. Engagement with national governments and stakeholders on these matters would have to be informed by a proper evidence base of needed support, both politically and factually, and not based on donor preference. Donor interests would have to be safeguarded through explicit contractual arrangements with concerned governments, indicating precise levels and duration of support, reporting mechanisms, and independent assessment and evaluation. Ideally, but subject to exception in cases of, for example, emergency or highly fragile contexts, or where pilot interventions are required, the EC and EU Member States should stay clear from directly funding national social protection programmes: support to be rendered should focus on

[76] *European Report on Development* (2011) 101, quoting from R Marcus, *Tackling Obstacles to Social Protection for Chronically Poor People* (Chronic Poverty Research Centre 2007).

[77] See in this regard also the 2010 EC Communication on Tax and Development [2010] COM 163, Council Conclusions 10349/10.

[78] Olivier, Andrianarison and McLaughlin, note 1, 45.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

strengthening the evidence base, as well as the institutional, operational and legal design of such programmes, and supporting assessment and evaluation.

VI. CONCLUSIONS AND THE WAY FORWARD: THE NEED FOR REFORM

The cue for both the EU policy and operational framework informing the promotion of social protection in the developing world needs to be taken from the constitutional requirement that development cooperation policy and involvement should have as their primary objective the reduction and, in the long term, the eradication of poverty (see TFEU, Article 208(1)). This objective has to be achieved via the fostering of sustainable economic, social and environmental development of developing countries (see TFEU, Article 21(2)(d)). These considerations, it is suggested, should provide both the *leitmotiv*, the driving force so to speak, and the monitoring benchmark for EU action in the social protection field in the developing world. Even so, meaningful and consistent involvement will hardly be achievable if other policy objectives, including non-development policies, are not aligned with this objective.

There are several implications, which in concrete terms flow from the application of the above framework. Two of these could in particular be highlighted. Firstly, the mode of setting and enforcing political conditionalities for the extension of social protection support may call for reconsideration. For example, instead of shying away from contexts with questionable human rights records, perhaps a more pliable approach would require of the EC and EU Member States to assist countries in addressing the very human rights deficiencies, while simultaneously appreciating that strengthening the social protection edifice could assist with bringing about the required reforms in the human rights domain. Secondly, in terms of the nature and scope of involvement, there is an evident need to move beyond an over-emphasis on short-term financial involvement in costly cash transfer programmes to longer-term, sustainable interventions. In particular, it is necessary to develop a stronger focus among others on building the institutional and legal capacity of developing countries in the social protection domain via targeted budgetary support and technical assistance. The recently announced EU Social Protection Systems Programme, aimed at supporting the establishment of sustainable and inclusive social protection systems in a number of key developing countries, provides an example of this much-needed approach.

While the constitutional basis for social protection involvement in the developing world is evident, a range of comprehensive policy documents, mostly of recent origin, have given clear meaning and explicit guidance on how development cooperation, also in the social protection area, should be conceptualised and concretised. Examples abound and include the *European Consensus on Development*, the EU's commitment to the *Social Dimension of Globalisation*, the EC *Communication on Tax and Development*, the EC *Agenda for Change* and *Communication on Social Protection in European Union Development Cooperation*, the EC *Statement on Development Policy*, the *Policy Coherence on Development* initiative, the *Code of Conduct on Complementarity and Division of Labour in Development Policy* EU Joint Multi-annual Programming – supported by important operational instruments (such as Fast Track initiative on

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

Division of Labour) EU Joint Multi-annual Programming, and informed by constitutive instruments developed in consultation with developing countries, including the Cotonou Agreement, the Aid Effectiveness Framework and Country Strategy Papers (together with their National Indicative Programmes). What is needed is not more policy direction, but actual and effective implementation and prioritisation of development cooperation and social protection along the lines indicated above and endorsed by these very instruments. Of particular importance is the strengthening of monitoring and implementing mechanisms and instruments, including EuropeAid, the European External Action Service, the *Code of Conduct* and the Fast Track Initiative and, at the apex level, the Council and the Parliament.

From an overall perspective, it is critical to support national ownership and capacity. Some guidance in this regard is to be gleaned from the documents and instruments listed above (in particular also the Aid Effectiveness Framework) and initiatives such as the EU Social Protection Systems Programme. The EU's commitment to the recently adopted ILO Recommendation 202 of 2012 on National Floors of Social Protection strengthens this approach, by defining social protection floors as nationally defined sets of basic social security guarantees which secure protection aimed at preventing or alleviating poverty, vulnerability and social exclusion.[79] ILO Member States are called upon to establish, as quickly as possible and in accordance with national circumstances, their social protection floors comprising basic social security guarantees and to maintain these. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security, which together secure effective access to goods and services defined as necessary at the national level.[80] It is submitted that this approach is at the heart of national ownership and capacity. The Recommendation foresees in particular that, in implementing the Recommendation, Member States may seek technical assistance from the International Labour Organization and other relevant international organisations in accordance with their respective mandates. This accentuates the important role that the EC and EU Member States have to play in this regard.

BIBLIOGRAPHY

Adesina, J (2010), *Rethinking the Social Protection Paradigm: Social Policy in Africa's Development*, Background paper for the *European Report on Development 2010*, 8, http://erd.eui.eu/media/BackgroundPapers/Adesina.pdf.

Devereux, S and R Cipryk (2009), *Social Protection in Sub-Saharan Africa: A Regional Review*, Brussels: IDS, 2009, 5–9, www.nwu.ac.za/sites/www.nwu.ac.za/files/files/p-fl/documents/Projekte/631133%20EU%20%28SP%20in%20Sub-Saharan%20Project%29%28FINAL%20REPORT%29%28EC%20FORM.pdf.

Devereux, S and P White (2010), 'Social Protection in Africa: Evidence, Politics, and Rights', *Poverty and Public Policy* **2**(3) 53–77.

Eeckhout, P (2011), *EU External Relations Law*, 2nd edn, Oxford: Oxford University Press.

European Commission (2004), *The Social Dimension of Globalisation – the EU's Policy Contribution on Extending the Benefits to All*, COM 383 final, Brussels: European Commission.

[79] ILO Recommendation 202 of 2012 on National Floors of Social Protection, para 2.
[80] Para 4.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

European Commission (2010), *Commission staff working document: Policy Coherence for Development Work Programme 2010–2013*, Brussels: European Commission.
European Commission (2010), *Communication on Tax and Development*, COM 163, Council Conclusions 10349/10, Brussels: European Commission.
European Commission (2011), *Increasing the Impact of EU Development Policy: an Agenda for Change*, COM 637, Brussels: European Commission.
European Commission (2012), *Social Protection in European Union Development Cooperation*, COM 446 final, Brussels: European Commission.
European Report on Development (2010), *Social Protection for Inclusive Development: A New Perspective in EU Co-operation with Africa*, Brussels: European Communities and European University Institute.
Marcus, R (2007), *Tackling Obstacles to Social Protection for Chronically Poor People*, Manchester: Chronic Poverty Research Centre.
Niño-Zarazúa, M, A Barrientos, S Hickey and D Hulme (2011), 'Social Protection in Sub-Saharan Africa: Getting the Politics Right', *World Development*, **40** 16–17.
Olivier, M, F Andrianarison and M McLaughlin (2013), *Study on Social Protection in Sub-Saharan Africa* (Report submitted to the European Commission), Brussels: European Commission.
Orbie, J and H Versluys (2008), 'The European Union's International Development Policy: Leading and Benevolent', in J Orbie (ed), *Europe's Global Role – External Policies of the European Union*, Farnham: Ashgate.
Organisation for Economic Co-operation and Development (2007), *Principles for Good International Engagement in Fragile States and Situations*, Paris: OECD.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:09:31PM
via University College London (UCL)

21. Social security law instruments of the next generation: European social security law as a source of inspiration?

Danny Pieters and Paul Schoukens

I. INTRODUCTION

European, but also international, social security law is heavily based upon a European vision of social security. The social security systems from the industrialised (Western) world, especially from Europe, influence(d) heavily the fabrics of the current transnational social security arrangements, whether they only coordinate systems for migrant workers or have a higher ambition of reaching out to harmonise national social security systems. Instruments such as the EU coordination Regulation 883/04 serve as a model for the development of coordination instruments all over the world. We assume that what works in Europe should also work elsewhere. Yet the question remains whether this approach can be upheld: European social security law may have been inspirational in the past, but is it to be copied blindly all over the world? And is this approach fitted for the needs of today's Europe and the world? Or should European social security lawyers dare to take a step forward and create a new generation of social security instruments adapted to the needs of this time? And by doing so, be inspirational for social security in the emerging economies, such as those of Brazil, Russia, India and China?

For the purpose of this handbook we limit ourselves to the standard-setting instruments, leaving aside the social security coordination instruments as well as the equal treatment instruments and other instruments of principle. As a consequence we shall leave aside existing EU law provisions and concentrate on international instruments, such as those developed within the International Labour Organization (ILO) or the Council of Europe. Yet this does not mean that the approach we shall develop for defining social security standards of a new generation will not be useful in the debate on EU social security standards.

In the first section we shall examine the actual state of the art: what are the main flaws of the current social security standard-setting instruments? Then we go a step further and discuss whether these instruments provide an answer to the main challenges that European and also other social security systems are being and will be confronted with. For that purpose we use the conclusion of a survey we conducted some years ago where we interviewed chief executive officers of social security administrations on the (upcoming) challenges for social security. In the final section of this contribution we aim to formulate an alternative approach in the formulation of new standards. To do so,

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

we start from some basic principles – the very essence – of social security. We will ask ourselves whether this alternative, new approach will provide for inspiration in the future.

II. THE INTERNATIONAL SOCIAL SECURITY STANDARD-SETTING INSTRUMENTS AND THEIR FLAWS

II.i The International Social Security Standard-setting Instruments

Over the years international law, i.e. treaties and other agreements between states, has dealt with various aspects of social security. Legal theory has subsequently tried to bring some order to this variety of legal instruments and has classified the sources of international social security law according to their nature, the framework in which they were concluded or with regard to their objectives.

According to their nature, a distinction is made between instruments of principle and instruments of substance.[1] Instruments of principle may take the form of instruments of fundamental law merely affirming the right to social security as one of man's social rights. Sometimes they will refer to the main aspects of an international approach to social security. These instruments of principle were drawn up especially following the last World War under the influence of the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations (1948).[2]

---

[1] Konstantinos Kremalis, 'General Principles of International and European Social Security Law', in Paul Schoukens (ed), *International and European Social Security Law* (Institute for Social Law 2013) 3.

[2] The most important declaration of principles in the field of social security law are to be found in:

at the level of the *United Nations*,

- the Universal Declaration of Human Rights (1948) (however no Treaty!);
- the International Covenant on Economic, Social and Cultural Rights (1966).

These declarations provide:

- that each human being as a member of society has a right on social security (Article 22 General Declaration, Article 9 Covenant)
- a right of life which guarantees to the individual and his family health and well-being, nutrition, clothing, housing, health care and the necessary social assistance (Article 25 General Declaration, Article 11 Covenant).

Furthermore, these documents affirm that families, mothers and children can claim a special protection by society (Article 25 General Declaration, Article 10 Covenant).

At the level of the *ILO*,

- the Constitution

and above all

- the so-called Philadelphia Declaration (1944),

containing the 'aims and tasks of the ILO'. According to these documents, the ILO strives for a worldwide improvement of working conditions, because 'the general and lasting peace can be

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

Instruments of substance such as the standard-setting instruments (ILO Convention no 102 or European Code of Social Security) are more detailed and usually devoted exclusively to social security. They develop the content of the right to social security and give it practical significance.

Although the distinction between instruments of principle and instruments of substance is well established, the distinction is not always easy to make in practice; moreover it is not so clear whether this distinction is directly legally relevant.

According to the framework within which international treaties have been concluded we can make a distinction between bilateral treaties and multilateral treaties, the latter being subdivided into world treaties, e.g. the International Covenant on Economic, Social and Cultural Rights, and treaties on a regional level, e.g. the European Social Charter.

According to the objectives of international law, it is possible to make a distinction as far as instruments of substance are concerned between instruments coordinating social security legislation and those harmonising social security legislation.

The aim of coordination is to establish legal, technical and administrative links between social security systems in such a way as to guarantee the most comprehensive and equitable protection possible to foreigners and migrants without modifying the specific characteristics of the systems themselves. The value of the international agreements on social security for migrants is that they lay down the fundamental principles of international coordination of social security legislation:

- equality of treatment (on basis of nationality),
- maintenance of acquired rights (export of benefits),
- maintenance of rights in course of acquisition,
- designating the competent country (resolving conflicts of law),
- mutual assistance in administration.

The aim of harmonisation is to bring the legislation of different states closer together by modifying provisions, where necessary, in line with an agreed international approach. Harmonisation reduces the differences between national social security schemes; it may do so in a very limited way, establishing minimum standards, setting principles (e.g. equal treatment of men and women) or a total unification of national social security legislation.

Because this chapter is dealing with international social security standard-setting instruments, the focus will not be upon harmonisation instruments merely setting

---

built up only on the fundaments of social justice'. For these purposes it tries to secure full employment, to introduce a minimum income for the needy, to guarantee a comprehensive health care and to protect mothers and children.

At the level of the *Council of Europe*:

- the European Social Charter of 1961 (Part I, paragraph. 12; Part II, Article 12 and other) and the Revised European Social Charter.

The European Social Charter is important as its ratification is a quasi-condition for acceding to the Council of Europe. The European Social Charter and the Revised European Social Charter refer to ILO Convention 102 and to the European Code of Social Security.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

principles or objectives, but rather on genuine standards which have to be upheld by the adhering states in their social security systems. Instruments dealing with principles are certainly less developed than the standard-setting instruments or coordination instruments. However over the past years the principle of equal treatment in all its appearances (gender, race, sexual orientation etc.), has been given quite some attention at both the international[3] and European level.[4] Those instruments will nevertheless not be included in our reflection, except when relevant for the discussion of the social security standards.

When considering harmonisation instruments in general and standard-setting instruments in particular, it is important to observe that only multilateral treaties deal with social security and not bilateral treaties. This could be explained by the fact that two states alone may not see the sense of agreeing to impose upon themselves social security standards. Standard setting is thus perceived as a matter of multilateralism.

For Europe, standard-setting instruments are being developed at the level of two multilateral fora: the ILO and the Council of Europe. Whereas the European Union has become involved with social security in various ways, mainly by setting principles (such as the equal treatment of men and women in social security) and by developing a comprehensive coordination mechanism, the European Union has nevertheless not imposed real social security standards upon the Member States. Because the focus of this chapter will be on international social security instruments, we will concentrate on the ones developed within the ILO and the Council of Europe. It may be useful to recall some of the essential features of these organisations.

II.ii ILO Standard-setting Instruments

When the ILO was founded in 1919, the discussion and the adoption of internationally applicable labour standards were considered to be its primary purpose and objective. Standard setting has remained the core of its work, albeit mainly in the area of labour law. Over 30 Conventions and over 20 Recommendations deal exclusively with questions of social security.[5]

---

[3] At the international level the principle of equal treatment in social security is guaranteed under the European Convention on Human Rights and Fundamental Freedoms (Article 14 ECHR and Article 1 Protocol no 12 to the ECHR).

[4] In the EU the principle of equal treatment in social security is guaranteed under Articles 18, 19, 45 TFEU and the Charter for fundamental rights in the European Union, Regulation 883/2004 on the coordination of social security systems; Regulation 492/2011 on freedoms for workers within the Union; Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Directive 2000/43 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin and Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation; Directive 2000/78 establishing a general framework for equal treatment in employment and occupation; Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast).

[5] For more information, ILO, *Social Security Standards*, www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/social-security/lang–en/index.htm.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

Whereas some older ILO minimum standard instruments dealt either with particular contingencies or particular categories of workers/activities,[6] the ILO was the pioneer in setting comprehensive social security standards. In 1952 it adopted the Social Security (Minimum Standards) Convention No 102. This Convention embraced in one legal text all the major branches of social security that had hitherto been dealt with in separate Conventions. With this universal Convention, the ILO took up the major challenge to take into consideration the very great economic and social differences between the states. An important issue was to find a way of standard setting which would not be totally out of reach of the poorer countries, but which would nevertheless have some relevance for the more developed systems.

The ILO Social Security (Minimum Standards) Convention No 102 contains nine parts corresponding to the nine risks covered by the most developed social security systems of that time. Each state is required to ratify at least three of the contingencies. States can choose which contingency they will ratify, however one contingency must be: the risk of unemployment, old age, industrial injury, invalidity or survival. This permitting of a piecemeal ratification, i.e. branch by branch, was to help the less-developed countries to join the Convention.

The ILO Social Security (Minimum Standards) Convention no 102 lays down for each of the nine branches of social security:

- Minimum standards as to the proportion of workers or the population who must be protected. It requires that a specified percentage of the population should be protected. For most of the contingencies, the percentage is either 50 per cent of all employees or 20 per cent of all residents.
- Appropriate conditions for the receipt of social security benefits and the duration of such benefits.
- Minimum rates of benefits. These rates must be sufficient to provide a specific sum for a 'standard beneficiary', defined by the Convention for the purpose of most contingencies as a man with a wife and two children. This benefit is not a fixed sum which applies for all countries but is put in relation to the professional income a standard beneficiary is earning in the concerned country. To arrive at this average income some alternatives are provided, which are put in relation to the type of system in use.
- Social insurances (of the Bismarck type) limited in their scope to workers: benefits are calculated in proportion to the previous earnings of the typical skilled worker.
- Where more uniform benefits are used for all groups of working population pursuant to the Beveridge idea: benefits are calculated in proportion to the previous earnings of the typical unskilled worker.
- Or when all residents are covered, a means test may be imposed provided a person without means receives not less than in the case of a uniform benefit calculated according to the second method.

[6] E.g. ILO Convention no 24 Sickness Insurance (Industry); ILO Convention no 25 Sickness Insurance (Agriculture); ILO Convention no 36 Old-Age Insurance (Agriculture); ILO Convention no 37 Invalidity Insurance (Industry), etc.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

The amount of benefit which a typical skilled worker in the case of the first method and a typical unskilled worker in the case of the second and third methods must attain is fixed at a percentage ranging between 40 per cent and 50 per cent according to the contingency.

The ILO Social Security (Minimum Standards) Convention no 102 has considerably influenced the development of social security in the world. It became a model and guideline for a significant amount of international legislation.[7] The Convention has also been ratified by many countries.[8] Furthermore, Convention no 102 became the structure on which the Council of Europe built its own set of European standards in social security. The model character was also confirmed outside of Europe by the social insurance minimum standards Convention adopted in 1971 by the Arab Labour Organization, which also covers all nine contingencies provided for by Convention no 102.

Other ILO instruments adopted after Convention no 102 provided for higher standards of social security and/or revised the pre-war one-contingency Conventions. The most important were:

- Employment Injury Benefits Convention No 121 (1964);
- Invalidity, Old-Age and Survivors' Benefits Convention No 128 (1969);
- Medical Care and Sickness Benefits Convention No 130 (1969);
- Employment Promotion and Protection against Unemployment Convention No 168.

Those higher standards ensure a wider scope of persons covered, improved medical care and related services, a longer duration of short-term benefits and the payment of all benefits in cash on more favourable terms and at a higher level.

II.iii Council of Europe Standard-setting Instruments

Although the international standard-setting instruments of the Council of Europe are the European Code of Social Security (1964) and its Additional Protocol of the same year, as well as the Revised European Code of Social Security (1990), we cannot discuss these instruments properly without first discussing the European Social Charter (1961), its Additional Protocol of 1988 and the Revised European Social Charter (1996).

The European Social Charter (1961) corresponds to the United Nations International Covenant on Economic, Social and Cultural Rights (1966) as well as to certain articles contained in the Universal Declaration of Human Rights (1948). It can also be seen as the economic and social counterpart of the European Convention on Human Rights of 1950. The Charter consists of a Preamble, five parts and an Appendix.

---

[7] Konstantinos Kremalis, 'General Principles of International and European Social Security Law', in Paul Schoukens (ed), *International and European Social Security Law* (Institute for Social Law 2013) 3.

[8] See for countries which ratified the ILO – Convention No 102, www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312247.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

Part I sets out a series of 19 principles which each contracting state 'undertakes' (Article 20§1) to consider as 'a declaration of the aims which it will pursue by all appropriate means'. These principles will influence national social policies but also the instruments developed at the level of the Council of Europe. Part II contains the 19 fundamental rights guaranteed by the Charter, which correspond to the principles set out in Part I. Part III lays down the different obligations of the states following from the 19 fundamental rights. At least five of a selected number of seven articles must be accepted. A partial acceptance is thus possible and Part III also provides for the possibility of subsequent or gradual acceptance of other provisions of the Charter, but without any obligation, time limit or sanction.

Article 12 of the European Social Charter (1961), recognises the right to social security and is one of the compulsory 'core' articles of the Charter. By accepting this article, Contracting Parties agree:

- to establish a system of social security (paragraph 1),
- to maintain it at a level at least equal to that required for ratification of ILO Convention no 102 (paragraph 2), and
- to raise it progressively to a higher level (paragraph 3).

The Additional Protocol to the Charter of 1988 added four new rights and principles:

- the right to equal opportunities and treatment in respect of employment and occupation without discrimination on grounds of sex;[9]
- the right of workers to information and consultation within the enterprise;[10]
- the right of workers to take part in the determination and improvement of working conditions and working environment;[11]
- the right of the elderly to social protection.[12]

In 1996 a Revised European Social Charter was adopted, which is rather similar to the previous one but it extends the scope of application of the persons protected by the Charter. On that occasion some new social rights were introduced as well, in relation to elderly, family protection and the combating of social exclusion. The Revised Charter attracted mainly the ratification of new member states of the Council of Europe. It is also important to mention that besides Article 12, other articles are gaining more and more importance with regard to social security such as 11 (health), 13 (social and medical assistance) and articles relating to youth, the elderly, the handicapped (Articles 10 and 23), etc.

The real standard-setting instrument of the Council of Europe bears the name of 'European Code' and is based on Convention No 102 of the ILO. The European Code of Social Security (1964) consists of a Preamble, 14 Parts, an Annex and two Addenda. Part I contains general provisions including the definition of certain terms. Parts II–X

[9] Article 1 Additional Protocol to the European Social Charter.
[10] Article 2 Additional Protocol to the European Social Charter.
[11] Article 3 Additional Protocol to the European Social Charter.
[12] Article 4 Additional Protocol to the European Social Charter.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

contain the provisions relating to the nine traditional branches of social security. Part XI covers standards to be complied with for periodical payments. Part XII is concerned, inter alia, with the suspension of benefit payments, right of appeal, funding etc. Part XIII contains miscellaneous provisions including contingencies which occurred before the coming into force of the Code. Part XIV contains some final provisions.

The European Code of Social Security (1964) essentially repeats the provisions of ILO Convention no 102 with only some very slight modifications. It requires ratifying states to comply with six instead of three benefits (some benefits counting for more than one). The Code indicates, in respect of each benefit, the minimum proportion of the population that must be covered against the risk in question. These standards are formulated in terms of percentages of employees, the economically active population or the residents of a given country.

The aim of the Code is basically to extend the scope of national social security legislation gradually until it covers the entire working population including the self-employed and ultimately until it covers the entire population whether economically active or not.

The Additional Protocol to the Code of 1964 lays down some higher standards concerning the subject matter (i.e. greater number of units to be ratified) and the persons covered (i.e. larger percentage of the population to be covered).

A Revised European Code of Social Security was adopted in 1990 and was mainly influenced by new legislative tendencies and social security practices applied in certain countries (e.g. emphasis on the beneficiary's real needs, on the prevention of risks, etc.), but also by strong criticism against the 1964 Code, which was characterised as 'rigid, conservative and discriminatory'.[13]

First, the Revised Code extends the personal scope (higher percentages of economically active population or of all residents set). The Revised Code often requires a coverage of 85–95 per cent in the various branches of social security. The Revised Code also improves the level of benefits. For instance, the minimum old-age benefit for a married couple rises from 40 per cent of the previous earnings or of a reference wage in the old Code and 45 per cent in the Protocol to 65 per cent in the Revised Code.

Secondly, new benefits were added in the Revised Code, such as a right to occupational guidance, training, retraining, integration, or reintegration services and aid to both occupational and geographical mobility.

Thirdly, the Revised European Code of Social Security (1990) contains a large number of preventive measures aimed at avoiding the occurrence of a contingency or, in the case of medical care, the deterioration of the condition or circumstances of the person concerned. The Revised Code also introduced greater flexibility by introducing the following changes:

[13] Danny Pieters, 'La révision du Code Européen de la Sécurité Sociale' [1990] *Il Diritto del Lavoro* 271–282.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

- The benefit standards can be satisfied by reference to either of two scales, one for the 'standard beneficiary', as defined in the old Code and in Convention no 102, which is always a household of two to four persons and the other for a single person.
- It introduces the new concept of 'equivalence'.[14] This means that any state may derogate from the provisions with regard to the different contingencies, if it can guarantee that it provides at least an equivalent protection to that laid down in the Revised Code. The classic nine branches of social security are thus simply administrative artefacts. The Revised Code sidesteps e.g. the employment injury problem by 'deeming' the requirements of the employment injury branch to be satisfied if an 'equivalent' protection is provided under the invalidity benefit.

When it comes to the supervisory procedure of the standard-setting instruments of the Council of Europe (Code, Protocol to the Code and Revised Code), member states are always required to report on their compliance with the standards provided in the (Revised) Code and the Protocol. The reports are assessed by experts of the ILO[15] or in the case of the Revised Code by experts of the Council of Europe.[16] The reports are then communicated to the Committee of Ministers of the Council of Europe. The Committee of Ministers takes the final sanction in case of non-observance where it can invite the concerned member state through a Resolution to rectify the situation. The control mechanism of the Code thus ends with a political decision.

II.iv Provisional Identification of the Flaws of Present Social Security Standard-setting Instruments

In order to better identify the problems and flaws of the existing standard-setting instruments we would like to revisit a study we made in the 1980s, examining the (need for a) revision of the European Code of Social Security.[17] Now more than two decades later and after the adoption of a Revised Code, are the conclusions we reached then still valid?

In the 1980s, the Council of Europe requested an examination of the legal impact of the Code and its Additional Protocol upon the social security systems of the member states. Measuring an impact is, however, not an easy task and as a lawyer this was done by first examining the areas where the Committee of Minsters took resolutions to rectify a situation in a given member state. Secondly the way the standard-setting instruments had been used in case law, in legal thinking and in the political debate, was examined. It was also examined whether the then projected Revised Code would bring solutions. In the end, an assessment was made of the instruments in the light of the objectives they proclaim to pursue. The results are very succinctly summarised in the following chapters.

---

[14] Article 7(2) Revised European Code Social Security.
[15] Article 73(3) and (4) European Code Social Security.
[16] Article 79(1) Revised European Code Social Security.
[17] Danny Pieters, 'La révision du Code Européen de la Sécurité Sociale' [1990] *Il Diritto del Lavoro* 271–282.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

The examination of the resolutions of the Committee of Ministers over the period 1973–1988 revealed that *prima facie* member states observed quite well their commitments under the Code. They were also willing to adapt their national legislation if, according to the Committee, such legislation was contrary to the Code. Yet at the same time the question arose whether the established control mechanism was the most appropriate manner to detect problems with the observation of the commitments under the Code. It is important to note that the whole control procedure is based on information provided by the states themselves. Sometimes it took years for the states to provide the requested information. In some cases states limited themselves only to an oral explanation by a government representative or the requested information was never provided. Sometimes the request could even 'vanish' over the years. When examining the areas in which the Committee of Ministers showed most supervising activity, the following topics were at the top of the list:

- health care and periodic benefits for victims of professional risks (labour accident, professional disease);
- participation of patients in health care costs;
- the (total or partial) refusal of social security benefits to persons having committed a serious fault (not being a crime or an intentional fault);
- the level of certain benefits.

The intervention by the Committee of Ministers was in most of the cases rather aimed at imposing a certain structure or a certain organisational approach upon the member states. Yet it was questionable whether this structure or organisational approach was still in line with the social security thinking of the moment (or rather reflecting an already outdated or at least challenged structure or approach). Why, for instance, should the protection of labour accidents be guaranteed in a separate scheme when the general scheme of work incapacity managed to provide social security coverage in line with the standards of the Code? In 1990 the main weaknesses of the Code were the following:

- the control mechanism takes many years, is passive and depends largely upon information provided by the states themselves;
- the Code protects a certain vision and structure of social security, rather than a certain level of social protection;
- the Code is not at the heart of legal and social policy debate;
- the resolutions do not touch the core of the social security debates in the member states;
- the national courts usually refuse to give direct effect to the provisions of the Code and to recognise subjective rights on the basis of this foundation.

In our study of 1990 we also asked ourselves a more crucial question: does the Code (or Protocol or the projected Revised Code) realise the goals the Code (or Protocol or projected Revised Code) assigned to itself? To identify these goals we have to consult the Preamble. We find as such goals:

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

- to contribute to the realisation of an ever closer union between the member states;
- to encourage the development of national social security systems in the sense of social progress;
- to harmonise social charges between the member states; and
- to guarantee in all member states an equally high degree of social protection, a degree higher than in the minima set by ILO Convention No 102.

What is there to say about the attainment of these goals? Any indication that the Code (or ILO Convention No 102, etc.) has contributed to the harmonisation of social charges is absent. Possibly the only impact of the Code relates to the distribution of employers' and employees' contributions. We can also ask ourselves if the Code has contributed to an ever closer union between the member states? We find very little to substantiate such a statement. If social progress means something other than stopping social regression, we find no indication that the Code would have urged states to make positive steps to improve their social security systems. But even as far as stopping social regression is concerned, the impact of the Code has certainly not been impressive.[18]

II.v An Attempt to Modernise International Standards: The 2012 Recommendation Concerning National Floors of Social Protection

In order to answer to the weaknesses of the traditional standard-setting instruments, to attract more adhesion to the ILO instruments also in developing countries and emerging economies and also to bridge the gap with the so-called 'human right to social security' approach, as developed by the UN Committee on Economic, Social and Cultural Rights when monitoring Article 9 of the International Covenant on Economic, Social and Cultural Rights, the ILO issued in 2012 a Recommendation No 202 concerning national floors of social protection. It would take us too long to analyse this Recommendation in full.[19] Let us simply stress from the outset that we are dealing here with a Recommendation hence a not legally binding document. Furthermore, the principles enumerated in Article 3 of the Recommendation are very broad and obviously not meant to be enforced to the letter. Otherwise, how should a principle of universality of the protection be understood when confronting it with professionally organised social insurance systems? Or how should a principle of gender equality

[18] The Secretary-General of the Council of Europe remarked that since the financial and economic crisis there have been numerous violations of the social rights guaranteed under the European Social Charter. Neither the Code nor the European Social Charter seemed able to stop social regression: Secretary-General Council of Europe, 'Press Communication', https://wcd.coe.int/ViewDoc.jsp?Ref=DC-PR011%282014%29&Language=lanEnglish&Ver=original&BackColorInternet=F5CA75&BackColorIntranet=F5CA75&BackColorLogged=A9BACE.

[19] For an in-depth, albeit in our view too enthusiastic, analysis, see Gijs Vonk, 'The 2012 Recommendation Concerning National Floors of Social Protection (n°202). The Human Rights Approach to Social Security in ILO Wrapping Paper' [2012] *International Journal of Social Security and Workers Compensation* 49–59.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

without any exceptions be understood? As far as the financing of social security is concerned the following principles should be mentioned:

(a) solidarity in financing while seeking to achieve an optimal balance between the responsibilities and interests among those who finance and benefits from social security schemes;
(b) consideration of diversity of methods and approaches, including of financing mechanisms and delivery systems;
(c) transparent, accountable and sound financial management and administration;
(d) financial, fiscal and economic sustainability, with due regard to social justice and equity.

One should appreciate the attention this Recommendation pays to the financing side of social security, but on the other hand deplore the fact that the principles put forward are self-evident or simply empty statements.

In Article 4 we read the proper aim of the social protection floors:

> Members should, in accordance with national circumstances, establish as quickly as possible and maintain their social protection floors comprising basic social security guarantees. The guarantees should ensure at a minimum that, over the life cycle, all in need have access to essential health care and to basic income security which together secure effective access to goods and services defined as necessary at the national level.

This idea is then developed in the following articles, after which there is also a chapter on strategies to extend social security.

Of course the Recommendation has noble goals, but we wonder whether the possible political benefit of such a document outweighs the negative dimension, that once again an ILO document enumerates nice principles, without any compelling character and probably without being able to make the difference when national measures reduce or fail to develop social protection in a country.

III. INTERNATIONAL STANDARD SETTING INSTRUMENTS AND THE FUTURE OF SOCIAL SECURITY

If social security standard-setting instruments are there to help the states and their social security systems to tackle future challenges, if they are to provide security against all kinds of policies which would not respect basic social protection and if they are to help states to move in the direction of social progress, it might be relevant to ask ourselves: what are these major challenges for the social security systems of today, and, even more interestingly, of tomorrow? The answer to this question is of course complex and is always bound to be partial. Yet our earlier research on the future of social security in Europe and in Brazil, Russia, India and China may shed some light on the areas a social security standard-setting instrument of a next generation may have to deal with.

In 2007 we presented the results of interviews we had with the social security administration CEOs in 15 Western European countries in a publication bearing the

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

title *Social Security Quo Vadis*.[20] In this study we reflected on the main determining factors for the future evolution of social security in Western Europe and, even more important, we were able to develop some 'important messages' for the future. These main messages concerned:

- the fundamental faith in social security;
- the interaction with democracy;
- the need for security and reform;
- the need for more interaction;
- intergenerational solidarity;
- working without social protection;
- the impact of migration;
- the activation policy;
- the question marks relating to financing and privatisation;
- the need to manage a growing number of complaints;
- the need for internal restructuring of social security administrations;
- national social security in a larger world.

In subsequent years we had the privilege to present these research results to a number of audiences both in Europe and outside. The reactions we received, especially from non-European audiences, triggered the question: would these issues, challenges and 'main messages' also be valid outside Europe? We explored what would be the main, common, determining factors and challenges for the future of social security in the four main upcoming economic powers, viz Brazil, Russia, India and China. Finding communalities in challenges and perspectives for these countries was not easy. At the end of our research in those four countries we came up with the following 20 items as the main challenges these countries (or some of them) are confronted with:[21]

- the lack of a social security paradigm;
- the coverage of all the (working) population;
- demography;
- changing family patterns and internal migration;
- the interaction between economic development and social security;
- the diversity of economic and social realities within one country;
- the lack of transparency of the social security system;
- poverty alleviation and basic needs;
- the lack of solidarity and interaction between social assistance and social insurance;
- the weak interconnection between social security actors;
- the place of private actors in social security;

[20] Paul Schoukens and Danny Pieters, *Social Security Quo Vadis? Interviews with Social Security Administration CEOs in 15 Western European Countries* (2006) http://eiss.be/onewebmedia/IBM%20Social_security_quo_vadis_6-22-07.pdf.

[21] Danny Pieters, Paul Schoukens, *Social Security in the BRIC Countries* (IBM 2012) www.businessofgovernment.org/report/social-security-bric-countries, 1–31.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

- pensions and other income replacement;
- the access to a qualitative health care and care;
- inflation and the validity of commitments for the future;
- identification and information technology-related issues;
- globalisation and world-wide competition;
- the need for a sustainable financial and economic basis/social security as a positive economic factor;
- the interaction between social security, social policy and other policy areas;
- deficient implementation, control and sanctioning;
- the need for another more creative approach.

We cannot expand on each of these main challenges which come to the fore in the European and in the Brazil, Russia, India and China study; but what is important in relation to the topic of the present chapter is the finding that the actual standard-setting instruments only very exceptionally address these challenges, although they are currently considered to be so important for the future. In this light we should not be surprised that one of the conclusions of the *European Quo Vadis* research was that when asked about external influences upon the development of the national social security systems, the CEOs did not even mention the international standard-setting instruments! Yet if standard-setting instruments have any meaning, they should have an influence on the development of the social security systems in the adhering countries. We hold the opinion that the alternative approach developed hereafter is better suited to addressing the major issues that both Europe, and Brazil, Russia, India and China are confronted with. At the end of the present chapter we shall try to prove this by establishing some new standards starting from some core principles underlying each of our social security systems

IV. GENERAL PRINCIPLES OF SOCIAL SECURITY LAW AS THE BASIS FOR STANDARD SETTING

IV.i Four Basic Principles

In order to set standards for social security, we may have to reflect first on the essence of the right to social security: what is social security about and what are the leading general principles of social security? Some years ago our Leuven Institute of Social Law (Research Unit Europe and Social Security) undertook, together with the Max Planck Institute for Foreign and International Social Law, pioneering research on the fundamental principles of social security law.[22] The research teams came to the formulation of some principles of social security that were articulated around four poles:

[22] Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

- security;
- solidarity;
- individual responsibility;
- protection.

In a first publication resulting from this initiative, the pole concerning security was explored.[23] Becker summarised what had to be understood by each of these different poles: security can be understood on the 'one hand as the special protection of legal positions held by persons in specific situations of need, protect[ing] the individual's claims under social security law'. This protection manifests itself in two ways. Firstly, this means that the legislator is not entirely free to question a once-gained position. This also means that an administration cannot withdraw a once-granted position. The principle of security on the other hand has a broader connotation, whereby it includes alongside legal expectation 'all security functions which are guaranteed over a specific period of time'.[24] Security thus addresses the time-related legal side of social security law, and it holds a promise to 'render future income replacement benefits, refunds or payments under predefined conditions'.[25]

The second principle deals with solidarity, which is an open term. Solidarity means mutual support.[26] In the case of social security law it is the fundamental requirement to include certain persons in the occurrence of specific risks or in case of specific situations of need. The concept of solidarity within a given legally constituted community might thus protect persons who are pregnant, or very old or cover the risk of permanent damage sustained through a work-related accident. Solidarity normally serves to explain and legitimate social law modifications of civil insurance law, i.e. it uses the method of financial redistribution as a modification of the principle of equivalence between contributions and benefits.[27]

Based on these considerations this element should deal with reciprocity and the need for a mutual acceptance of responsibility as a legal element of social security. It therefore addresses the collective legal side of social security law.[28]

Individual responsibility deals with the relation between citizens and the community. Subjectively, individual responsibility means that persons who are protected can in specific situations lose the protection of social security law. This can be when their conduct contravenes the interests of the community or because their situation is atypical, and thus not suited to burdening the community.[29] Individual responsibility objectively implies that an individual should in the first place respect objective criteria, which are preconditions to holding the community accountable.

---

[23] Ulrich Becker, 'Introduction to the General Principles of Social Security Law in Europe' in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 17.

[24] Ibid.

[25] Ibid.

[26] Ibid.

[27] Ibid.

[28] Ibid 15–16.

[29] Ibid 16.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

Correlating with the above-mentioned meaning, this principle of individual responsibility has an additional meaning. It also includes the 'different legal requirements which citizens need to fulfil in order to take part in the national social security system'.[30] Specifically, it involves personal initiative, personal care and personal responsibility. Thus it addresses the individual legal side of social security law, which is at present especially stressed when it comes to the legal meaning of activating social policy.[31]

Protection, first of all, should be understood as special procedural rights of individuals with regard to specific situations of need. It therefore tries to facilitate the enforcement of claims under social law. These rights can differ from the rights guaranteed under procedural law before another court and/or administrative procedures.

As a result of these considerations the element of protection has another wider meaning. It includes not only administrative procedures and judicial review, but all items involving legal decisions taken on behalf of citizens who are consequently left without a choice because the system is supposed to know what is best for them. Thus this principle addresses the paternalistic legal side of social security. One could assume that this side has, as far as social benefits and thus positive action of the government are concerned, a stronger impact than it would have in situations in which individuals claim their rights in order to protect them from restrictions on their civil liberties.[32]

Could we not develop a new generation of standards of social security which would just aim at regulating in a similar way these four general principles of social security? As our research focused largely on the principle of security we considered it for the time being easier to come up with minimum standards relating to this principle. Yet we believe we may already suggest some standards relating to the three other general principles of social security law as well, albeit that further investigation of each of these three principles may facilitate the identification of additional standards relating to each of these general principles.

IV.ii Security-related Standards

When trying to identify standards concerning the general principle of security, the goal set by the Code and the Revised Code, namely to stop the deterioration of social protection and to counter social regression, would be addressed. This goal is hardly reached by the actual standards of the Code (and Protocol and Revised Code). Could standards of the new generation be more effective to reach this goal? We could ask ourselves two questions: whether or not it would be possible to set certain limits to the action of the government to change national social security legislation, and if we could set standards concerning these limits? Indeed already now some national constitutions set limits as to change and the procedure of changing.

---

[30] Ibid.
[31] Ibid.
[32] Ibid.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

In doing so we also give substance to at least two of the obligations enshrined in Article 12 of the (Revised) European Social Charter granting a right to social security:[33]

- the obligation addressed to establishing and maintaining a social security system;
- the obligation to maintain it at a satisfactory level;
- and possibly also the obligation to endeavour to progressively raise the amount of protection to a higher level.

Next to this, we must also cite Article 13 European Social Charter, which grants a right to social and medical assistance for everyone who is without resources and who is unable to secure such resources by themselves or from other sources, such as social security.

It follows from our earlier study that 'security' can be seen as an emerging legal principle in different European constitutional orders. This means that the constitutional orders of the member states recognise, at least implicitly, a responsibility for the state to provide security of existence to the people living under their jurisdiction. This may take different forms, ranging from a very comprehensive social security system to only a limited number of social insurance or social assistance schemes. However, what is for sure: no state can take the attitude that citizens themselves should fully provide for their own means. In this way the legal principle of 'security' as we mean it here can be seen as the legal translation of the 'freedom from need' of the Philadelphia Declaration pillar of the Allied ideology during World War II and the foundation of the United Nations.[34]

What does this imply for a standard-setting instrument of the next generation?

A first provision of a new standard should guarantee the duty of the state to take responsibility to provide existence security to all people living under their jurisdiction. This guarantee can be realised through social insurance, social assistance or any other intervention. According to the principle of individual responsibility the state has to provide for basic security allowing for living in human dignity and for the real possibility for all individuals to secure a higher degree of existence security.

Second, a next-generation international instrument should contain an obligation for the states to provide and maintain sufficient financial means to fulfil their protective duties. This implies the duty to allocate enough financial means in the budget to meet the subjective rights to benefits and the duty to respect the autonomous financial entities in charge of meeting subjective rights to benefits and the duty to adapt current social security legislation in order to make the financial means and the recognised subjective rights meet in the near future.[35] In our earlier analysis concerning the

[33] This treaty has not been ratified by Switzerland. The United Kingdom did ratify the (original) ESC but made an explicit reservation for Article 12(2), 12(3) and 12(4) ESC.

[34] Bob De Mars, Danny Pieters and Paul Schoukens, 'Security as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 633.

[35] Ibid 610; see also the German *Untermaßverbot*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

principle of security, it was held furthermore that on a second level, the principle of 'security' can be seen as the duty of the state not only to take care of the people, but also to do so in a particular way. This means that when their concrete means of existence are at stake, a state again cannot simply change the law.[36]

However the security principle finds its limits in the duty and not only in the right of states to adapt the social security systems to ever-changing needs.[37] The principle of security urges states who want to change (for the worse) the conditions, benefits or contributions to make sure that they reflect on how to operate the legislative restrictions without eroding the principle of security.[38]

This links the principle of 'security' to other general principles of law like the rule of law, legal security, trust, equality and proportionality. This means that the respect for individually acquired rights and legitimate expectations cannot be duly disregarded and is safeguarded by this principle of 'security'.

In defining what is to be considered 'unduly', standards of the new generation may provide effective protection. All social security reforms have to reconcile two divergent aspirations. First they need to adapt the system to social and economic evolution, and second they should safeguard the aspect of 'security' which implies that a state should respect to a certain extent acquired rights and aroused expectations.[39] When changing social security law, this means that the legislator will have to take into account the principles of fairness, equality and proportionality.[40]

These principles could be turned into the following standards:

- Reforms of social security legislation have to be 'fair' to all persons who participate in the system. This entails that all persons who through taxes, contributions or otherwise have substantially supported a scheme cannot be excluded from the scheme when they are reaching or nearly reaching the situation where they will benefit from the scheme.
- Reforms of social security legislation should not introduce new distinctions or do away with existing distinctions if this change cannot be justified on objective legal grounds.
- Substantial changes in social security legislation should not be excessive in proportion to the aspired legitimate purpose of the reform. This proportionality test will be accompanied by a necessity test when the reform relates to the core of a person's social security position.

In our study, we noticed that the 'security principle' may lead to a 'stand still' imperative. This is, however, not the case when the social security system is changed in a way justified on objective grounds and proportionally to the pursued goal; it is also

---

[36] See note 34.

[37] Bob De Mars, Danny Pieters and Paul Schoukens, 'Security as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 634.

[38] Ibid 633.

[39] Ibid 623.

[40] Ibid.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

essential that all concerned groups will be affected in an equivalent manner by the reform disregarding the 'stand still'. In other words, whereas the security principle may in a first step entail a 'stand still' clause, the latter may be overruled in so far as all concerned persons suffer in an equivalent way from the raising of the contributions, the restrictions in the benefit conditions or the lowering of the benefits.[41]

This allows us to identify one more standard:

- When social security duties or levies or social security benefit conditions or amounts are changed to the detriment of the persons concerned, the various groups of persons affected by the reform should suffer from this change in an equivalent way. This principle of equivalence has, however, to be understood in the light not only of the general principle of 'security', but also from the perspective of the general principles of solidarity, individual responsibility and protection.

In our earlier study we also explored which meaning the protection of property could have in relation to social security rights. We wrote: '[a] public system of social security establishes a compulsory insurance system that obliges individuals to make certain contributions to the national public system in order to safeguard them from loss of income in the occurrence of a social risk'.[42]

Because of this an individual could refrain from other ways of attaining income security (e.g. through private insurance or savings) as the statutory and mandatory nature of the public system makes an individual assume that his means of existence are (partially) guaranteed. This confidence in a given system of social security arouses certain expectations which one could classify as parts of an individual's property.[43] In this respect, one could argue that these vested expectations need a sort of legal protection analogue to the classic theory on expropriation. As such, financial compensation would have to be provided if social legislation is altered in an unfavourable way.

This viewpoint is, however, thwarted by two principles that are fundamental for every form of mandatory social security but that are absent within property law: 'solidarity' and 'redistributive justice'. Self-evidently a sort of balance has to be struck.[44] The German constitutional court developed a whole theory in this respect, but was not followed in this by many other European countries.[45] Without taking a position in the 'protection of property' applied to 'social security rights and expectations' debate,[46] we can however still reflect on how new social security standards can provide

---

[41] Ibid 634.

[42] Ibid 633.

[43] Engelbertus Pieter De Jong, 'Verworven rechten in de sociale zekerheid' [1983–84] *RW* 2437.

[44] See Note 34, 618.

[45] Ibid 619.

[46] Ibid 619; see also: Asbjorn Kjonstad, 'Social Security and Private Property – Human Rights and Constitutional Law', in Jef Van Langendonck, *The Right to Social Security* (Intersentia 2007) 181–186 for a comparison between German and Norwegian case law (similar discussion).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

for a solution to the fundamental concern underlying the debate on the protection of property and social security rights.

Even though social security law may change over time, people trust their national social security system; they know (or can be expected to realise) that social security law may change over time, but they can reasonably expect that social security commits itself to provide for income replacement or cost compensation. This means that they do not have to take up private provisions in order to cope with the social eventualities covered and thus that they will continue to rely upon social security partially or totally for the coverage of these eventualities. In other words it would be unacceptable that a person who does not take up private income-securing measures because of a reasonable trust in social security would find him/herself in need as a consequence of a change in social security law.

This trust in social security can reasonably be expected to be greater if social security is already paying out benefits. If social security legislation is changed when a person has only participated during a few years in that social security arrangement, he/she may not have built up such trust. In other words the often-made distinction between 'acquired rights' and 'legitimate expectations' may be more gradual than substantial.

We wrote earlier in relation to this that the term 'acquired rights' is mostly used in the context of succession of social security laws, where an old favourable piece of legislation is replaced by a new, less advantageous one. One could think of the situation where an individual would (partially) lose his entitlement to a social benefit as a result of a reform of the social security system. The question here is to what extent this individual could claim that he can remain under the (more favourable) conditions of the old legislation. One could reformulate this into a discussion about the application in time of newly drafted social security laws.[47] While discussing the safeguarding of legitimate expectations in the case of social security law reforms, one should also take into account the possible protection of rights in acquisition, e.g. the situation of a 64-year-old where the statutory pensionable age is raised from 65 to 67 years of age. Despite the fact that this person does not have a subjective right to a pension at the time of the modification as the social risk has not yet occurred, could it not be argued that he has a legitimate expectation to continue falling under the old pensionable age?

In these cases it is not so much the social security reform as such which is to be put to the test, but rather the clash between the situation of the concerned person(s) before the change and the situation afterwards. As such they call for standards concerning the maintenance of the old situation or the establishment of transitional arrangements. Once such standards are established by a next-generation instrument, the uncomfortable detour via the protection of property can be avoided.

That it is possible to define standards in relation to the temporal effects of newly enacted legislation is illustrated by e.g. the Swiss Federal Guidelines for a Sound Legislation offering a decent summary of the main principles:[48]

---

[47] Ibid 623–624.

[48] Thomas Gächter, 'Country Report on Switzerland', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 530.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

- Facts that happen after the coming into force of the new law will be judged according to that new law.
- Facts that have completely happened under the old law continue to be governed by these old provisions.
- Prohibition of (unfavourable) retroactive legislation unless justified by a legitimate reason and under strict conditions.[49]
- Facts that originated under the old law, but continue to have effect under the new one, will fall under the new law for the time period after its coming into force ('improper retroactivity' or 'immediate application').

When applying these principles to social security law changes, a distinction may have to be made with regard to the last principle. In case of a favourable reform the immediate application of the new legislation will be the standard.[50] If less advantageous changes are implemented, however, one will notice that these are always accompanied by some transitional measures.[51]

Substantial legal changes in long-term benefit schemes will often result in longer transitional periods during which an existing beneficiary will remain under the more favourable old legislation. They will also give more weight to the protection of legitimate expectations than substantial changes of short-term benefit schemes.[52]

V. OUTLOOK

The above illustrates that by analysing the legal implications of the very basic principles underlying any social security law, such as the principle of security, we can define relevant social security standards of a new generation. Further research should enable us to develop the three other basic principles, solidarity, individual responsibility and protection, in a similar way and then to derive standards of the next generation from these principles. What we can already establish now is that next-generation social security standards, such as the ones suggested above as derived from the security principle, do already address some of the major flaws the current standard-setting

[49] One may not confound this with interpretative legislation, which gives a statute the meaning it should always have had. Danny Pieters, Paul Schoukens, 'Country Report on Belgium' in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 42.

[50] One has to point at an Irish reform that extended full social insurance to civil servants.

[51] Bob De Mars, Danny Pieters and Paul Schoukens, 'Security as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 634.

[52] Grega Strban, 'Country Report on Slovenia', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 413–414 and Bob De Mars, Danny Pieters and Paul Schoukens, 'Security as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe* (Europa Law Publishing 2010) 631.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

instruments are burdened with. Moreover they are more apt to address the major trends and challenges, as we identified them in our European and BRIC *Quo Vadis?* papers. We shall try to illustrate this by referring to the standards derived from the security principle, but also by suggesting already some other standards which may be connected to the other three basic principles of social security.

When analysing the major flaws of the present standard-setting instruments, we could first of all establish that they apparently do not touch (any more) upon the heart of the legal and social policy debate related to social security. Yet although the CEOs in Western Europe repeated over and over their faith in the essence of social security, they also stressed the need to be able to change the basics of social security legislation. The BRIC analysis showed likewise that there was a need both for establishing the paradigm of social security and for creativity to address social issues in the context of emerging economies. In our opinion developing standards starting from (four) basic principles of social security law could respond to this challenge in an effective way.

Setting minimum standards did not apparently contribute to realising the goals that the existing standard-setting instruments set themselves: they did not bring the national social security systems closer, nor did they contribute to social progress. Even the attempt to stop social regression was highly questioned. As far as the latter ambition is concerned, it is evident that the standards derived from the principle of security already provide for stronger safeguards. As such they also address areas of major concern of the CEOs in Europe, such as those articulated under the heading 'how to better combine reform and the need for security' or the heading 'how to reconcile social security with democratic decision making'. Issues related to inflation and the validity of commitments for the future could also find answers in the standards developed on the basis of the security principle.

It is obvious that once the basic social security law principle of solidarity is developed and articulated into standards of the new generation, concerns about the intergenerational solidarity, the solidarity between rural and urban areas or between different professional social security systems within one country, will be properly addressed. Also the relation between social insurance and social assistance could be articulated in standards derived from the solidarity principle.

The issues related to activation policies, so weakly addressed by the existing instruments, may get proper 'next-generation standards' based on the principles of solidarity and individual responsibility. The same applies when social security standards are to address the reality of private protection against social risks, which existing social security standard-setting instruments fail to do.

A combined application of the principles of protection, individual responsibility and solidarity may be enlightening in solving issues related to migration.

Developing standards on the basis of the four fundamental principles of social security also allows for setting legal norms which are legally enforceable and this without disrupting the balance between the interests of society at large and the rights of the individual. The existing standard-setting instruments, to the contrary, only provide for guarantees for a more or less large part of the (working) population leaving the rest without guarantees.

On the basis of the four corner pillars of the social security construction, we could develop also some completely new standards, not so much social security standards as

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

such, but standards establishing the relations between this very important area of societal and public concern, and other policy areas. Those standards would also establish direct connections between economic development and social protection levels.

Was it not already often demonstrated that a good system of social protection could absorb better economic shocks and crises? That social security can provide people with enough income to make the domestic markets stable or even grow? At the same time has it not been stressed over and over that no social paradise can be built upon an economic graveyard? In many countries social protection is curtailed or limited in its expansion by the argument that international competition does not allow for more social expenditure. These lines of argumentation can be found both in the 'old' social protection countries of Europe, the emerging economies of the same European Union and the emerging economies on a world scale (the BRICs). Finding a balance between economic development and social protection is at the core of the preoccupations of policy makers and academics, both national and international. But very often they discuss the issues in distinct circles: whereas the ILO discusses social protection issues from one angle, the World Bank and the International Monetary Fund seem to take up the issues from quite a different one.

Existing social security standard-setting instruments are often insensitive to economic development issues, whereas legal instruments to support economic development are hardly interested in social issues. The result is often that legal instruments do not connect with daily reality or that social issues are regulated by economic principles. Again here a different approach based on the basic principles of social security law, on the one hand, and the basic principles of law in other areas, could enable us to develop international legal instruments of a next generation addressing in an equilibrated way the relation between economic development and social protection.

It is clear that we are only presenting some impressions of how the next-generation international standards relating to social security could look. We were, however, convinced that this volume of research on European social security law should think outside the box and venture on new paths, paths which may later appear fruitful or completely useless … but let us take the risk. Is that not what research is all about?

BIBLIOGRAPHY

Becker, Ulrich (2010), 'Introduction to the General Principles of Social Security Law in Europe', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe*, Groningen: Europa Law Publishing, 3 ff.

Becker, Ulrich, Danny Pieters, Friso Ross and Paul Schoukens (eds) (2010), *Security: A General Principle of Social Security Law in Europe*, Groningen: Europa Law Publishing.

De Jong, EP (1983), 'Verworven rechten in de sociale zekerheid' *RW* 2437–2545.

Kjonstad, Asbjorn (2007), 'Social Security and Private Property – Human Rights and Constitutional Law', in Jef Van Langendonck (ed), *The Right to Social Security*, Antwerp: Intersentia 181–186.

Kremalis, K (2013), 'General Principles of International and European Social Security Law', in Paul Schoukens (ed), *International and European Social Security Law*, Leuven: Institute for Social Law.

De Mars, Bob, Danny Pieters and Paul Schoukens (2010), 'Security as General Principle of Social Security Law in Europe: Conclusions on Legislative Aspects', in Ulrich Becker, Danny Pieters, Friso Ross and Paul Schoukens (eds), *Security: A General Principle of Social Security Law in Europe*, Groningen: Europa Law Publishing, 605 ff.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

Pieters, D (1990), 'La révision du Code Européen de la Sécurité Sociale', *Il Diritto del Lavoro* 271–282.
Pieters, D and P Schoukens (2012), *Social Security in the BRIC Countries* (Washington: IBM, www.businessofgovernment.org/report/social-security-bric-countries.
Schoukens, P and D Pieters (2006), *Social Security Quo Vadis? Interviews with Social Security Administration CEOs in 15 Western European Countries*, http://eiss.be/onewebmedia/IBM%20Social_security_quo_vadis_6-22-07.pdf.
Vonk, G (2012), 'The 2012 Recommendation Concerning National Floors of Social Protection (no 202). The Human Rights Approach to Social Security in ILO Wrapping Paper', *International Journal of Social Security and Workers Compensation* 49–59.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 01:58:31PM
via University College London (UCL)

22. The land of four quarters: The future of European social security law

*Gijsbert Vonk**

I. INTRODUCTION

The final chapter of this book deals with the future of European social security law. I shall discuss this subject neither as a seer nor as a fortune teller. Instead I am going to present four possible scenarios for the future of the EU governance model of social security (see Figure 22.1). These four scenarios are placed on a simple raster matrix, both axes represent uncertain future developments. The horizontal axis depicts the intensity of the process of European integration. The process may deepen and accelerate (EU united) or it may grind to a halt or even reverse (EU disintegration). The vertical axis depicts the possible evolution of social security between the two extremes of 'consolidation' and 'fragmentation'. The future scenarios must then be seen as the results (governance models) ensuing from the four possible combinations which exist in the matrix raster.

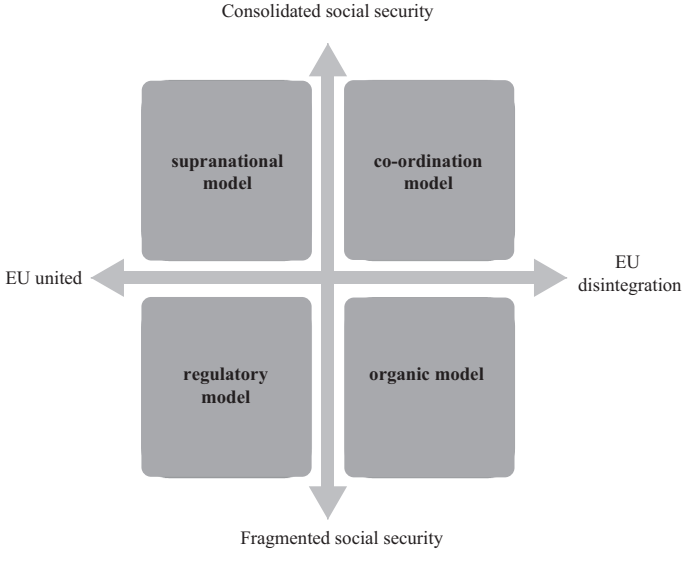

Figure 22.1 Scenarios for future social security

* I want to thank Barbara Brink for the intellectual support she gave when I was writing this chapter and for lending me her handbooks on political science and public administration.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

First of all, in this Section I will give some guidance as to the meaning and interpretation of the two axes. While the horizontal axis of EU united versus EU disintegration might be clear from the outset, the vertical axis of consolidation versus fragmentation definitely requires more explanation. What do these concepts mean and why not choose more obvious policy extremes, such as public versus private or central versus local? In Sections II to V I will present the four EU governance models of social security. They come under the banners of: the supranational model, the co-ordination model, the regulatory model and the organic model. Section VI is reserved for some concluding observations: how do the visions of the authors contributing to this research handbook fit in the governance models?

For the purposes of this chapter the term 'governance model' refers to a typology of instruments that are used to realise EU social security objectives. For the sake of clarity, I refer to the *social security objectives* as the official mission mentioned in the EU 2020 strategy, which refers to inclusive growth by realising higher employment rates and reduced poverty levels. Concrete targets have been developed by the European Commission for these objectives.[1] Also it is possible to fall back on Article 151 TFEU with its roots in the original EEC treaty of 1957:

> The Union and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

EU instruments available to realise these goals can be very different. Binding EU law is one of them. In order to be able to facilitate an external view of the future of European social security law, I will employ the wider term of 'governance'. Binding law is one of the instruments of governance operating alongside soft law and non-legal instruments.

It is tempting to develop a preference for one of the four governance models. If one considers contemporary literature in the area of political science and public administration, with its emphasis on the diminishing role of the national state and its rejection of EU hard law centralism, the regulatory model might emerge as the favourite for many commentators, at least this is my impression. Conversely, those with political interests vested in the member states are perhaps more likely to argue in favour of the co-ordination model, while European federalists may dream of a supranational EU social security system, etc. But in this chapter I will try to refrain from developing a preference for any of these governance models. The governance models presented must be seen as outcomes of possible future developments that we cannot really predict, each of them having its own merits and shortcomings. Here the reader must be warned that I defend each model with equal vigour and enthusiasm, although, admittedly, some models made this easier than others. But on the whole, I was surprised to learn how European social security law is potentially capable of adapting itself to an unsure future, as a consequence of intense interaction with the outside world.

---

[1] See Chapter 9 of this volume.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

I.i EU United versus EU Disintegration

Before I present the models it is helpful to elaborate upon the meaning of the opposing trends projected in the raster matrix. Let us start with the horizontal axis dealing with European integration. Defining European integration touches upon a very lively debate and an astounding richness of literature produced by political scientists. A useful definition of integration I came across is one given by Ernst Haas in 1958, when he refers to it as a process 'whereby political actors in several distinct national settings are persuaded to shift their loyalties, expectations and political activities towards a new centre, whose institutions process or demand jurisdictions over pre-existing national states'.[2] However broad, this definition suits my purposes as it defines integration as a process which involves a shift of power away from the nation state to a new, in our case a European, centre. In political science, integration theories are classified into federalist, neo-functionalist and liberal inter-governmentalist theories (and some others I hasten to add). Each of these theories provides a framework of understanding as to how and why powers slip away from individual member states to institutions to an external centre. The inescapable outcome of this process is a power shift to European institutions which impact more heavily upon national policy domains and domestic government activity, including the area of social policy and social security. This is what is meant by an 'ever closer Union'.[3]

Curiously enough, textbooks on European integration do not contain any theories about the opposite trend of disintegration, at least none that I am aware of. While European integration may be described as a 'process of dialectic incompleteness, unevenness, and partial frustration',[4] or as an Echternach procession,[5] it nonetheless moves forward. Apparently, a collapse or implosion of the European project is not regarded as feasible, at least by mainstream academics; there are, of course, individual commentators who theorise and speculate about a process of disintegration.[6] There are also authors who combine these two visions of Europe, such as Jan Zielonka in his essay entitled *Is the EU Doomed?*[7] According to the author it might well be doomed, but this is not something to be frightened of as Europe as an integrated entity may well continue to grow stronger.

---

[2] Quoted by Antje Wiener and Thomas Diez (eds), *European Integration Theory* (Oxford University Press 2004) 2 with reference to EB Haas, *The Uniting of Europe: Political, Social, and Economic Forces 1950–1957* (Stanford University Press 1958) 16.

[3] Article TFEU: 'This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.'

[4] Philippe C Schmitter, 'Neo-functionalism', in Antje Wiener and Thomas Diez (eds), *European Integration Theory* (Oxford University Press 2004) 45–75, 70.

[5] Elspeth Guild and Florian Geyer, *Getting Local: Schengen, Prüm and the Dancing Procession of Echternach; Three Paces Forward and Two Back for EU Police and Judicial Cooperation (*CEPS Commentaries 2006*).*

[6] See Ivan Krastev, 'European Disintegration? A Fraying Union' (2012) 23(4) *Journal of Democracy*.

[7] Jan Zielonka*, Is the EU Doomed?* (Wiley 2014).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

For the purposes of this model, disintegration is considered to be a possibility. I reserve the term for a process of integration that is becoming bogged down or even reversing. Allowing for such a scenario is not just a way of pleasing the growing number of Euro-sceptics even among the closest of my friends. Neither is it done to play tribute to British Prime Minister Cameron who wants to have the reference of the 'ever closer Union' scrapped from the EU treaty. It is just a matter of showing some humility in the face of the course of history, which nobody can predict.

I.ii Consolidated versus Fragmented Social Security

The description of social security evolution in terms of consolidation and fragmentation needs a little more explanation. I first used the term social security fragmentation in a presentation in 2006 to describe the structural developments in Dutch social security in terms of an 'expulsion from paradise'. It was for a round table for civil servants organised by the Ministry of social affairs. This was more or less my argument:

> While once in the 70s of the previous century social security constituted a comprehensive system of social insurance and social assistance under the one roof of the Ministry of social affairs, it has now spread in all directions. There are new methods of income protection: fiscal measures, life cycle savings schemes, statutory labour law protection, local welfare initiatives, etc. These new forms of social security come under various names and banners and give rise to various new agencies which are engaged in the administration and supervision, some public, some private, some hybrid. There is no longer a unique policy focus to hold social security together. Instead the whole project is hijacked by a pragmatic political agenda which includes exogenous policy goals. Fiscal austerity, immigration control, the wish to restore citizens' values and the desire to control individual behaviour are engines for change as well as income protection and activation. Together the constant stream of interventions leads to more conditionality, which in its turn complicates the legal position of beneficiaries. The result is that beneficiaries rely heavily on the judiciary to clarify or strengthen their individual legal position. This complicates matters even further, particularly taking into account that this case law seems to be increasingly overshadowed by the European courts in Luxemburg and Strasbourg. The fragmented social security landscape is held together by a network philosophy and the increased dominance of ICT in gathering information and delivering benefits. But the citizen does no longer understand the logic of the system and has estranged himself from the essential message, that the state represents the community characterized by solidarity. The Dutch experience is not a unique one. The neighbours on the other side of the channel are messing up the system even more than us. But on the eastern borders, the system has at least maintained some characteristics of the old monolithic system, because there social security is at least held together by the one and only Sozialgesetzbuch with its inner order and logical structure administered by a stable bureaucracy. The German welfare state is a consolidated welfare state.

This is what I told my audience. Looking back at the lecture I must admit that my portrait of Germany and the UK were stereotypes and that my analysis was perhaps carried too much by a feeling of nostalgia for the golden age of social security and resentment about the deconstruction that followed. But there is more to it than that. As it turns out, this notion of fragmentation is not at all unique to social security. It lies at the core of the analysis of a modern and complex society as a whole, with tentacles reaching out to globalisation, individualisation, the decline of social capital, the

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

'network society' (Castells[8]) and the 'risk society' (Beck).[9] Fragmentation is a generally recognised characteristic of contemporary society.[10]

Fragmentation goes hand in hand with shifts of government away from classical central state institutions. Power shifts away vertically to European and international institutions and in the other direction: to regional and local government. It shifts away horizontally to the judiciary, to private co-operations, to functional public authorities and to civil society organisation. It even – paradoxically – shifts to the individual citizen who is increasingly called upon to act as a co-producer of public policy and individual decisions. It is with these power shifts that we identify the term fragmentation.

If fragmentation is such a widespread structural phenomenon for society as a whole, why choose it as an uncertain trend for the purposes of our matrix? First of all, it is possible to see fragmentation as a governance continuum, whereby in the one extreme central state institutions maintain a full grip on the formation and administration of social security (consolidation) and in the other extreme all power is fully relinquished to other actors (fragmentation). This is an important notion, for in between these two extremes there are many points which by now we have learned to appreciate as contemporary modes of governance. For example, the contemporary public/private divide is not an absolute one. Discussions on privatisation invariably end up in deliberations on the 'regulatory welfare state': how does the state exercise control over private institutions in order to make sure values of social security in terms of protection, universality, equality of treatment, etc. are not undermined?[11] Does it matter in this respect whether control is exercised by the state or rather by social partners who run schemes collectively? Similar questions of governance arise in relation to the decentralisation discussion.[12] Is it possible to localise the welfare state, without letting go of the final responsibility of the state for the welfare of its citizens? What instruments can be used by central government to realise this responsibility: regulation, supervision, financial incentives, etc.? Secondly, it remains at least a theoretical possibility that social security will evolve towards a consolidation, or that such consolidation will come about in reaction to some crisis or major event. Calls for a universal credit,[13] a Europe-wide social security scheme[14] or even a basic income for all[15] are never fully silenced.

---

[8] M Castells, *The Rise of the Network Society* (Blackwell 1996).

[9] U Beck, *World Risk Society* (Polity Press 1999).

[10] Cf. Victor Bekkers, *Beleid in beweging. Achtergronden, benaderingen, fasen en aspecten van beleid in de publieke sector* (Lemma 2012) 28–34 (versplinterde samenleving).

[11] See GJ Vonk and A Tollenaar (eds), *Social Security as a Public Interest. A Multi-disciplinary Inquiry into the Foundations of the Regulatory Welfare State* (Intersentia 2010).

[12] See GJ Vonk and A Tollenaar (eds), *Lokale verzorgingsstaat. Nieuwe uitdagingen voor de sociale rechtsstaat* (Vakgroep bestuursrecht en bestuurskunde 2012).

[13] A UK government attempt to harmonise the multitude of means-tested non-contributory benefits in one scheme, which ran into organisational trouble and has so far not been realised.

[14] For example, the thirteenth state proposal for migrant workers by Danny Pieters and Stefan Vansteenkiste, *The Thirteenth State* (Acco 1993).

[15] See Phillipe van Parijs, 'A Basic Minimum Income. A Simple and Powerful Idea for the 21st Century' (2014) 42(1) *Politics and Society*.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

II. THE CO-ORDINATION MODEL

Let us start with the north-eastern quarter of the matrix, the co-ordination model. This resembles the existing governance model for European social security law the most. Articles 117 and 118 of the old EEC Treaty did not grant any clear powers in the field of social security to the community institutions, apart from promoting the co-operation and the exchange of information between the member states. Binding measures were only to be expected from the co-ordination of social security, presented as a by-product of the freedom of movement of workers in then Article 51 EEC. It is in view of this situation that social security has been referred to as the last bastion of autonomy of the member states. Apart from some partial exceptions in the area of the equality of treatment between men and women and employee protection in the case of transfer of undertakings and insolvency of the employer, no harmonisation has ever come into being. While it is true that the member states have had to endure frequent and sometimes highly resented interference from the Court of Justice in the field of the co-ordination and the freedom of movement of persons, in the end the court has always drawn a clear line between harmonisation and co-ordination. Co-ordination is supposed to leave the member states free to decide upon the architecture, structure and entitlement conditions of their own social security systems.[16]

The original division of competences is still visible in the present state of European social security law, although the social security powers of the EU institutions under Article 153 TFEU have now widened. But the open method of co-ordination is still favoured over binding measures. This approach fits in with the relative autonomy the member states still want to maintain. For this reason I refer to the present governance model as a 'co-ordination model'. It refers to the two types of co-ordination (OMC and the co-ordination system of protection of social security rights of mobile persons through Regulation 883/2004).

With the governance model arising out of the Euro crisis, things start to differ. Through the backdoor of economic governance and the European Semester, EU guidelines are now encroaching closer and closer upon the field of employment law, wages and social security.[17] In reality this cannot be denied, but it is not envisaged in the present model, which is not based on an Ever Closer Union but on disintegration.

Is this co-ordination model bad for realising social security objectives? Not necessarily. Remember, in this model national governments are the masters of their own social security systems. Democracy is guaranteed through the national parliaments, some of which are very old. Perhaps, in such a situation, the analysis of the 1956 Ohlin report underlying the article 117 EEC compromise continues to hold true. Each country has the social security system that it deserves economically. In the meantime, an upward harmonisation of the social security standards is expected to occur through the invisible hand of competition between the member states and the market mechanism. Or as Article 151 TFEU still puts it: 'such a development will ensue … from the

[16] Expressed by the Court of Justice of the EU for first time in Case C-1/78 *Kenny* [1978] ECR 01489, which is consistent case law. See also Pennings in Chapter 13 of this volume.

[17] S Bekker, *The EU's Stricter Economic Governance: A Step Towards More Binding Coordination of Social Policies?* WZB discussion paper SP IV (WZB 2013) 501.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

functioning of the common market, which will favour the harmonisation of social systems'.

It can be argued that with the waiver of national monetary powers following on from the introduction of the Euro, the analysis contained in the old Ohlin report is no longer valid, as member states can no longer de- or re-value their currencies. In other words, it is no longer possible for a member state to sustain a high level of social expenditure without incurring negative effects for the competitive position, simply by devaluing the currency. Indeed, this is true, but there are others who claim that with improvements in the OMC method, non-binding co-ordination remains a possible policy alternative for integration in non-federal Europe.[18] In any case, it cannot be said that the 60 years of experience with the existing mode of governance has worked out badly for the development of social security in Europe, despite fears of social dumping and the effects of negative integration. The welfare states in Europe have proven to be resilient.[19] It can even be submitted that a relaxation of the strict co-ordination rules for mobile persons would not be a drama for the EU mobile citizens. At least there is evidence that a system of co-ordination can also function without the context of supranational watchdogs such as the Commission and the Court of Justice: bilateral and multilateral co-ordination treaties are also a possibility.[20] One has to argue his case in these social conservative, Euro-sceptical terms in order to defend the virtues of the co-ordination model.

III. THE ORGANIC MODEL

We are now moving on to the south-eastern quarter, where there are still no European powers in the field of social security, but where the governments no longer exercise full control over their social security systems either. If we close our eyes and imagine what the world looks like, a thriving but chaotic landscape emerges of mechanisms, programmes, arrangements, funds and schemes to provide income security. The scale of the schemes varies from very small local care initiatives to huge pan-European private pension funds. One person is probably affiliated to a multitude of such institutions. For example, while my minimum pension is still guaranteed by the Dutch old-age pension scheme, I am now also a member of a life-cycle savings account set up for personnel of universities belonging to the Hanseatic League (a co-operation between Northern European cities). Also I participate in a community support centre in the area where I live (which occasionally requires me to look after my senile neighbour) and free basic health care is provided by a separate scheme set up by the province of Groningen, which has decided to come up with a scheme for its own residents after central

[18] However reluctant such claims might be. See, for example, the interesting paper by Renaud Thillaye, *Co-ordination in Place of Integration? Economic Governance in a Non-federal EU*, Working Paper No 32, www.foreurope.eu.

[19] See Paul Pierson, 'The Welfare State over the Very Long Run' (Zes-Arbeitspapier 2011).

[20] For an overview of global co-ordination efforts, see Roger Blanpain et al (eds), *Social Security for Migrant Workers*, *Selected Studies of Cross-border Social Security Mechanisms* (Kluwer Law International 2014) 84.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

government decided to go further along the path to private health care. Central government is trying to co-ordinate the variety of schemes that have come into being, but with limited effects. New developments and approaches move in like waves. The operation of the schemes is highly ICT driven. Like social media contacts, social security liaisons are volatile and seem to generate themselves. European institutions do not have much grip on this process either. There are plenty of European initiatives in the form of resolutions from the European Parliament and communications by the Commission, calling for vigorous action and flagship initiatives for this or for that. But the documents are toothless. In this model, society is in charge of social security, not the state.

Having some inclination towards the anarchistic, this imaginary social security world appeals to me. It is fast, adaptable, non-repressive and based on true solidarity ties and personal responsibility. It grows organically and develops by learning. But behind its romantic appeal there are dark clouds on the horizon. Will such a system be capable of protecting the weak and the vulnerable? Will it lift 20 million people out of poverty before 2020? What will be the position of those who somehow missed the bus of life and cannot organise social security for themselves? This is indeed a serious concern for the project of social security which did not develop into national schemes in which each worker's or citizen's participation is rendered obligatory without good reason. If it is to succeed it would invariably infer that there is a residual social assistance programme for vulnerable citizens. In this model, such a programme would be a shared responsibility for all layers of government and for civil society. If there is a system failure, all the actors must take collective steps to seek a solution.

The organic model of governance probably goes hand in hand with a lively human rights discourse. The fewer guarantees the system gives to each person's full protection, the more human rights will be called upon to address the problem. This is why certain groups of persons who are presently excluded from the scope of the social security system, such as asylum seekers and other immigrants with weak status, rely so heavily on the court mechanism where they invoke human rights in order to claim support. This leads to frequent interventions by the Court of Justice, the European Court of Human Rights and the European Committee of Social Rights. Were we to move in the direction of the organic model, it is judicial institutions such as these that will play an increasingly important role as watchdogs of the social security project. Of course, countervailing power from the judiciary can only be successful when the rule of law is maintained and an accessible and effective legal mechanism exists to invoke protection of the human right to social security.

IV. THE REGULATORY MODEL

In the regulatory model the social security mechanism is highly fragmented but now under strict control of the European institutions which have unlimited powers in the social field. This does not mean to say that the European institutions are the owners and administrators of social security. This is a model based on the philosophy of 'steering but not rowing', a paradise for regulatory governance and a most serious contestant to

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

receive the Giandomenico Majone prize.[21] All possible instruments to reach overarching objectives are used: setting minimum norms, formulating common policy standards and binding targets, introducing positive and negative financial incentives, concluding performance contracts with the member states, regional government and private social security institutions, etc. The whole system requires a huge exchange of data from the local level to the central European level. Also, in order to monitor whether European objectives are met, a multi-layered system of supervision and inspection has come into being giving rise to a complex functional bureaucracy. This is the open method of co-ordination, but now with serious ties attached and now blown up to huge proportions. Democratic control over this system is primarily exercised by the European Parliament. National and regional governments are co-administrators of centrally established rules and policies.

Obviously, this model is attractive in terms of realising the social policy objectives and it combines this advantage with a high degree of subsidiarity and freedom at the domestic level. What is special about the model is that the overarching targets and objectives can be imposed on domestic schemes which are designed for different purposes. For example, suppose the domestic social security systems only serve partial interests for smaller groups of persons through a diversity of categorical special non-contributory benefits, and Europe is interested in realising reduced levels of poverty, a stronger income position for those who are engaged in atypical labour relations and better protection for young parents with care responsibilities for children. The only thing that the European bureaucrats have to do is turn some knobs on the huge control panels of their regulatory system and the local social security systems will start to react to help these goals to become reality. At least in theory. This is not an organic learning system, but one which is based on the notion of rational government.

Another possibility in this model is to realise a higher degree of solidarity between the countries and regions of the European Union. This can be done using the structural funds to directly fund national, regional and local social security initiatives. The income of the EU's own resources chiefly comprises agricultural levies on products from non-member states, customs duties from the common customs tariff and a percentage of the VAT receipts. Each member state contributes to the EU resources based on their trade with third countries and their own economic activity and thus contributes to the funding of the common expenditure. This may also be social security spending. For example if the EU finds a reason to help setting up a guaranteed minimum income in Greece as reparation for its stringent budgetary regime imposed on this country, this could be done with resources from the EU structural funds. Also local or civil society initiatives can be supported in this way. In fact, the recent initiative of the European Commission for a €3.8 billion Fund for European Aid to the Most Deprived already operates in this manner. The intention is that money for material aid will be distributed

[21] Giandomenico Majone is a leading academic authority in the field of European regulatory governance. A prize in his honour is awarded by the ECPR Standing Group on Regulatory Governance for outstanding research by scholars in the field of regulatory governance from all relevant disciplinary academic backgrounds.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

through a network of non-governmental or local public organisations.[22] If we look more closely at the Regulation establishing the Fund, it becomes apparent that the distribution of aid still requires the intermediation of the member states. In our model this is a possibility but no longer a necessity. Direct EU funding is also possible. EU funding of domestic social security initiatives is an expression of intra Union solidarity.

V. THE SUPRANATIONAL MODEL

Our fourth model gives way to supranational European social security schemes where the EU institutions own, finance and even administer the schemes. Dreams about a harmonised social security system are as old as the EU itself. They were discussed at the beginning of the 1960s by the European Commission, leading to a total boycott of the Social Council between February 1964 and December 1966. These were real tensions about the future of Europe, which easily rival the family squabbles that we have today.

Then in 1975 a report on economic and monetary union, published under the auspices of the then chairman of the EU Commission Marjolin, proposed the introduction of a common unemployment insurance system.[23] Such a benefit would be financed from a community fund, supported by employer and employee contributions paid directly into the fund. This proposal provided for a redistribution of the cost of unemployment among the member states with high benefit levels. The common unemployment benefit was meant to supplement the national benefits up to a specific level, as a result of which the poorer member states would be able to claim a larger share from the fund.

Ideas about a common unemployment insurance system have never left the European Commission. The Commission continued to initiate academic work in this field and on 13 June 2014 the then EU Commissioner for employment, social affairs and inclusion, László Andor, gave a speech in which he advocated a concrete idea for a basic European unemployment insurance. According to the Commissioner such a scheme would be beneficial to the fiscal stability of the eurozone by allowing for a system of monetary transfers between countries with high unemployment and countries with low unemployment. A basic unemployment scheme would replace the corresponding part of national schemes. The levels of the contribution and of the benefit should represent a relatively low common denominator between the rules of the various national schemes. For example, the basic European unemployment benefit would be paid only for the first months of unemployment and the amount would represent 40 per cent of the previous reference wage. Each Member State would be free to levy an additional contribution and pay out a higher or longer unemployment benefit on top of this European

[22] Regulation 223/2014 [2014] OJ L72. See *European Commission memo/14/170* of 10 March 2014.

[23] The economic and monetary union 1980, Brussels, 1975.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

unemployment insurance. Thus, the European scheme would be designed to guarantee 'a fairly basic standard of support during short-term unemployment'.[24]

While the latest versions of a common unemployment system clearly have a financial and economic rationale, ideas for a Europe-wide social security scheme are rooted rather in social objectives, in particular poverty alleviation. In 1981 the Commission issued a communication which addressed the problem of poverty in Europe and the need for common minimum income standards. It was suggested by the Commission that a minimum income should be introduced in the member states which should take into account the minimum requirements of the individual or the family, be universally available to all non-active persons and be granted as a right.[25] This initiative eventually led to Council Recommendation 92/441/EEC of 25 June 1992 on common criteria concerning sufficient resources and social assistance in social protection systems.[26] Obviously the recommendation was not binding and two decades later in 2010, the European Anti-Poverty Network launched a working document containing an elaborate and detailed proposal for a minimum income framework directive, prepared by former Member of the European Parliament, Anne van Lancker.[27] The same year a proposal for a resolution for such a directive was tabled in the European Parliament, but failed to get a majority.

In terms of effectiveness of realising EU social security goals, a Europe-wide minimum scheme is an appealing one. Such a scheme would still have to operate with differentiated benefit levels according to the standard of living of the countries, but nonetheless the effect of such a scheme on reducing poverty levels must be impressive, taking into account that some countries, particularly among the new member states, apply benefit levels which are far below 60 per cent of the average national wage level, while some other countries in the southern region do not yet have a national universal safety net at all. Another advantage of a European minimum income scheme is that it still allows for flexibility and even autonomy for the member states to organise the extra minimal level. Social security can thus be construed as a two-pillar system, whereby the first pillar is a mandatory European one and the second pillar of extra minimal protection remains a competence of the member states. Also the introduction of a European minimum income scheme is much simpler from an administrative point of view compared with the immense complexities pertaining to the regulatory model discussed in the previous section.

The reason why a European minimum income scheme has not been feasible is related to the lack of powers in the TFEU and the political resistance against conferring competences in this field on EU institutions. Perhaps the dream will only become a reality after a major event, in the same way that the crisis of the 1930s gave way to Roosevelt's nationwide mandatory minimum pension system for old age, survivors and

---

[24] Lecture by László Andor, 'Social dimension of the Economic and Monetary Union: what lessons can we draw from the European elections?', Berlin, Hertie School of governance, 13 June 2014, http://europa.eu/rapid/press-release_SPEECH-14-455_en.htm.

[25] 23 Com (81)10 def.

[26] [1992] OJ L245/46.

[27] A van Lancker, *Working Document on a Framework Directive on Minimum Income* (EAPN 2010).

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

disability, surviving up to this very day in the form of the Social Security Act of 1935. The Euro crisis of recent years, which has left so many people in Southern Europe unemployed and without any social protection, has had the potential to create such an event and the threat is not over yet. What will happen if the millions of dissatisfied and poor youngsters without opportunity from the poorest regions start to march on the capital cities and Brussels?

VI. THE AUTHORS' POSITION

Now that our reconnaissance of 'the four quarters of the land' has come to an end, let us now take a last look at the contributions of the authors of this volume to find in what quarter they situate their hopes and aspirations for the future of social security law. Not all contributions can be qualified in this manner, but when they can, it appears that most of them stay closely within the realm of the here-and-now of the co-ordination model. This may be logical for a handbook on European social security law: lawyers tend to take the present state of the law (and the divisions of competences on which it is based) as a starting point for their analyses. However, this is not to say that all the contributors rejoice in the present state of the law. What comes to the fore most of all is the complaint about the 'incongruent' state of European law and integration: a lack of inner cohesion.

Thus, for example, Copeland and ter Haar (Chapter 9) observe that there is a conflict of interests between social and economic policy objectives with the latter threatening to overshadow the former, just when the EU has more competences in the economic field. In his chapter about destitution and migration. Verschueren (Chapter 16) complains that the EU has difficulties in 'reconciling the right to free movement of persons and to equal treatment as a fundamental right with a constitutional status on the one hand with the policy objectives of fighting poverty and social exclusion explicitly laid down in the Treaty provisions and policy documents on the other'. Pennings (in Chapter 13) is concerned about a co-ordination of social security for migrant workers without any national harmonisation. Van der Mei, who discusses the co-ordination of student financial aid systems in the EU (Chapter 18) points at the uneasy relationship between the general export duty of maintenance grants for students ensuing from the notion of European citizenship and the rights to such grants based on the freedom of movement of workers. For Golynker (Chapter 19) the point of concern with regard to the current regulation of patient mobility is 'that it is trapped in the dilemma of achieving patient mobility without encouraging treatment outside the Member State of affiliation which stems from the clash between the interests of individual patients and national healthcare systems in the cause of the redistribution of the financial burden and consequent renegotiation of the national healthcare contract'. Katrougalos (Chapter 4) points at the difference in legal effect that is granted to classical human rights and fundamental social rights while Mikkola (Chapter 7) frequently points a finger at the tensions that arise from the fact that minimum standard setting has developed in the context of the Council of Europe and the ILO but not in the EU.

What do authors do with these misgivings, in what direction do they want European social security law to change? This is quite revealing. In the first place: none of the

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

authors has suggested solutions that would fit in the supranational model. Apparently, the prospect of a central EU social security scheme is too daunting, too hot to handle. Or perhaps it is considered to be unrealistic for political reasons. It may also be the case that it is not so much the lack of Euro-enthusiasm but rather a lack of support of a system of centralised, consolidated social security which is perhaps deemed to be too inflexible, bureaucratic or not in tune with local needs.

In the second place: none of the authors has suggested any solutions that would fit in the organic model. This is to be expected. Only anarcho-libertarians would enjoy the prospect of simultaneously allowing Europe *and* social security to fall apart, but then again, let us hope we will not have to cope with such a scenario.

In the third place, in my observation, only one author has made a proposal that would strengthen the co-ordination model of governance. This is Anne Pieter van der Mei in Chapter 18. He suggests that in order to take into account the legitimate concerns of the member states, we have to release the member states from the obligations ensuing from Article 7(2) Regulation 1612/68 (now Regulation 492/2011), which protects the student children of migrant workers. In his view, instead, the EU must opt for a coherent co-ordination system for study grants, preferably within Regulation 883/2004, which is based upon a single-state rule, which makes clear which member state must assume responsibility for paying maintenance grants. This is clearly a proposal which would combine national autonomy with the classical objective of co-ordinating social security for the purposes of facilitating the freedom of movement of persons, now as EU student citizens. Van der Mei should be congratulated for the purity of this proposal. Instead of simply defending and hanging on to the achievements of the case law of the ECJ, he looks for more coherence within the present division of competences between the member states and the EU institutions.

Finally, in the fourth place, most of the authors have made suggestions which, in my observation, fit best in the regulatory model of governance. The clearest examples of this are Golynker (Chapter 19) and Borsjé and van Meerten (Chapter 15), who are all searching for new forms of governance combining EU objectives with national complexities. For example, Golynker's plea for the development of cross-border co-operation and partnerships between healthcare authorities creates a paradigm shift by facilitating patient mobility within the EU without creating a conflict between patients and the national solidaristic community. Similarly, the European Pension Union advocated by Borsjé and van Meerten is based upon the heterogeneity of national pensions systems, which should merely be provided with a stronger European governance framework. Also the proposals advocated by Pieters and Schoukens (Chapter 21) have a strong regulatory flavour. They do not aim to make the systems more uniform, but rather to create a principle-based framework, which takes account of the relationship between social security and other public areas, such as economic development.

Thus, on the whole, more European integration, allowing more national flexibility, seems to be the dominant trend. This is in line with the suggestion I made in the introduction to the Chapter, ie, that if one considers contemporary literature in the area of political science and public administration, with its emphasis on the diminishing role of the national state and its rejection of EU hard law centralism, the regulatory model

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

might emerge as the favourite for many commentators, apparently also for legal commentators.

BIBLIOGRAPHY

Beck, U (1999), *World Risk Society*, Cambridge: Polity Press.
Bekker, S (2013), *The EU's stricter economic governance: a step towards more binding coordination of social policies?* Discussion paper SP IV 2013, 501, Berlin: WZB.
Bekkers, Victor (2012), *Beleid in beweging. Achtergronden, benaderingen, fasen en aspecten van beleid in de publieke sector*, The Hague: Lemma.
Blanpain, Roger (ed) (2013), *Social Security for Migrant Workers*, *Selected Studies of Cross-border Social Security Mechanisms*, Alphen a/d Rijn: Kluwer Law International.
Castells, M (1996), *The Rise of the Network Society*, Oxford: Blackwell.
Guild, Elspeth and Florian Geyer (2006), *Getting Local: Schengen, Prüm and the Dancing Procession of Echternach; Three Paces Forward and Two Back for EU Police and Judicial Cooperation.* CEPS Commentaries, http://aei.pitt.edu/11629/1/1411.pdf.
Haas, EB (1958), *The Uniting of Europe: Political, Social, and Economic Forces 1950–1957*, Stanford: Stanford University Press.
Krastev, Ivan (2012), 'European Disintegration? A Fraying Union', *Journal of Democracy* **23**(4).
Pierson, Paul (2011), 'The Welfare State over the Very Long Run', *Zes-Arbeitspapier* **2**.
Pieters, Danny and Stefan Vansteenkiste (1993), *The Thirteenth State*, Leuven: Acco.
Schmitter, Philippe C (2004), 'Neo-functionalism', in Antje Wiener and Thomas Diez (eds), *European Integration Theory*, Oxford: Oxford University Press, 45–75, 70.
Thillaye, Renaud (2013), *Co-ordination in Place of Integration? Economic Governance in a Non-federal EU*, Working Paper No 32, www.foreurope.eu
Van Lancker, A (2010), *Working Document on a Framework Directive on Minimum Income*, Brussels: EAPN.
Van Parijs, Phillip (2014), 'A Basic Minimum Income. A Simple and Powerful Idea for the 21st Century', *Politics and Society* **42**(1).
Vonk, GJ and A Tollenaar (eds) (2010), *Social Security as a Public Interest. A Multidisciplinary Inquiry into the Foundations of the Regulatory Welfare State*, Antwerp: Intersentia.
Vonk, GJ and A Tollenaar (eds) (2012), *Lokale verzorgingsstaat. Nieuwe uitdagingen voor de sociale rechtsstaat*, Groningen: Vakgroep bestuursrecht en bestuurskunde.
Wiener, Antje and Thomas Diez (2004), *European Integration Theory*, Oxford: Oxford University Press.
Zielonka, Jan (2014), *Is the EU Doomed?*, Hoboken: Wiley.

Frans Pennings and Gijsbert Vonk - 9781782547327
Downloaded from Elgar Online at 03/12/2018 02:11:33PM
via University College London (UCL)

Index

accession 66, 121–3, 127, 141, 143–4, 165, 186, 231
accidents 6, 131, 269, 354–5, 423, 452
  industrial 28, 117, 163
  road traffic 309
  work-related 276, 548
accommodation 12, 75, 79, 369, 495, 525
  reasonable 250, 286, 288, 297–8, 300, 309, 312–14
acquired rights 92, 333, 536, 551, 553
acquis communautaire 39, 211–22, 265–6, 270
activation
  measures 346–8, 382
  policies 546, 555
active inclusion 209, 219, 221–2
active labour market policies 222, 346
active persons 135, 138, 326, 331, 334, 341, 413, 418
adequate living conditions 73, 75–6, 82
administration 3, 13, 18, 25, 536, 545, 548, 564–5
AEF *see* Aid Effectiveness Framework
affiliation 357, 364, 490–1, 494–5, 497–9, 502–3, 512, 572
age 78–9, 235–7, 241, 251–2, 295, 297, 300, 350
  discrimination 232, 244, 313
aggregation rules 325, 335, 341, 426
agreements
  bilateral 68–9, 82, 92, 129–30, 321, 446, 462, 465
  international 11, 96, 151, 164, 195, 287, 289, 459
  partnership 460, 462, 518
  social security 13, 68–9, 446, 448, 454, 459–60, 462, 467
Aid Effectiveness Framework (AEF) 518, 528, 532
Airey case 53, 105
Albania 110, 464
aliens 10, 64–5, 81
allowances 61–3, 72, 126, 158, 259, 268, 270, 276
  care 162, 168, 284, 286, 294
  family 69, 99, 110, 130, 133, 326–7, 335
  means-tested 259, 423
ambiguity 413–14, 436, 441–2
Amsterdam Treaty 204, 240, 344
ancillary costs 495
antagonistic approach 491–3, 498, 500, 507, 512
anti-cumulation rules 477–8, 484, 486
appreciation, margin of 58, 60, 62, 65, 67, 109–10, 125, 129–30
Arendt, Hannah 8, 32
Argentina 460–1
Armenia 110
assistance 12, 14, 18, 29, 32, 134, 290, 347
  development 522–4
  emergency 63, 108, 124–5, 139
  housing 28, 117–18, 417, 424–5
  medical 84, 96, 112, 288, 540, 550
  technical 84, 197, 220, 528, 531–2
asylum seekers 67, 74–8, 106, 118, 439, 455, 463, 568
  reception 53, 75, 118
at-risk-of-poverty threshold value 155, 186
Atlantic Charter 6, 259
Austria 62–3, 69, 107–8, 110–11, 125, 130, 306–8, 311
  nationality 62, 124–5
authorisation 397, 403, 463, 493–4, 496–7
  prior 493–7, 506
  refusal 494, 496
  requirement 493, 495, 502
authoritativeness 192–3
autonomy 28, 98, 115, 272, 473, 566, 571
  argument 473
  individual 19
  private 299, 306
average incomes 290–1, 315, 538

balance 72, 126, 171, 414, 418, 437–8, 552, 555–6
  fair 58–9, 132, 431
banking crises 166–7
basic income 260, 532, 545, 565
Belgium 74, 127, 139, 337–8, 371–9, 448, 458, 476
  employers 372–4, 376–9
  law 338, 372–3, 376–8

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

legislation 337, 372, 377
sickness benefit 338, 372, 377–8
beneficiaries 15, 18, 153, 156–7, 160–1, 166–7, 427, 564
standard 152, 538, 542
benefit rights 132, 136, 142–3, 323–4, 329, 333
benefit tourism *see* benefits, tourism
benefit trap 291, 313
benefits 55–61, 88–92, 107–13, 130–3, 149–57, 323–36, 341–2, 426–8
cash 106–8, 110, 112, 118, 155, 161–2, 168, 346–7
core 117–18
disability 131, 332, 338
emergency 124–5, 139
family 149, 322, 327, 329–30, 350–5, 468, 470, 484–7
see also family allowances
income-substituting 90, 155
invalidity 63, 91–2, 149, 268, 461, 542
long-term 152, 331
maternity 90–1, 149, 153, 353
minimum subsistence 414, 418–19, 422, 426, 429
non-contributory 92, 342, 429
old-age 92, 96, 149, 155, 276, 324, 453–4, 459
retention 26, 88, 92, 110–11, 428, 431
social 63–6, 68, 154, 413, 421, 423, 425, 432–7
tourism 41, 341, 414, 430, 432, 434–5, 437, 479
unemployment 90, 92, 133, 135, 332–3, 335–6, 346–7, 382
universal 89, 155
welfare 56, 58–9, 108–9, 114, 124, 131, 430
bilateral agreements 68–9, 82, 92, 129–30, 321, 446, 462, 465
birth 60–1, 70, 123, 236, 238, 265, 273, 424
blue card holders 455–6, 458
Bologna process 469
Bosmann case 329, 350–3, 355
Brazil 460, 534, 545, 547
breadwinners 151, 153, 259–60, 262, 264–5, 269
model 261, 271, 276
Brey case 342, 428, 433–7
budgetary reasons 180–1, 476
budgets 127, 218, 227–9, 311, 510, 523, 550
national 311, 385, 500
social 95
Budina case 74–5, 106
Bulgaria 65–6, 132, 156, 162, 448, 501
burden, unreasonable 134, 312, 341, 413, 428, 430–4, 440

capital income 155–6, 159
capital reserves 399–401
care 81, 243, 249–50, 260, 268–9, 276–7, 286, 496–7
see also healthcare
allowances 162, 168, 284, 286, 294
medical 6, 22, 149, 151, 282, 438, 503, 541
responsibilities 243, 249, 253, 262, 569
care-givers/carers 248, 261, 277, 424
careers 240, 243, 248, 268, 274, 276, 335, 411
Carson case 68–9, 129, 141
cash benefits 106–8, 110, 112, 118, 155, 161–2, 168, 346–7
special non-contributory 428, 433, 435
CEDAW *see* Convention on the Elimination of all Forms of Discrimination Against Women
CEOs 545–7, 555
Charter of Fundamental Rights 103, 113, 115–16, 118–20, 236–7, 289, 405–7, 417
child benefits 61, 64, 107, 135–6, 153, 329, 484
childcare 260, 262, 264, 275
facilities 250, 262–3, 273–4
children 152–3, 221–3, 267–8, 350–1, 424–5, 478–82, 484–5, 487–8
dependent 71, 478
non-resident 481–3, 487
China 163, 453, 464, 534, 545–7
choice 66–8, 360–1, 379, 381, 488, 492–4, 498–501, 504–5
free 277
informed 492, 495, 498–9
political 429, 504
citizens 11–14, 133–6, 413, 415, 418–19, 421–4, 470, 478–80
European 164, 222, 456, 487
mobile 92, 567
Union *see* Union citizens
citizenship 12, 14, 17, 32–45, 47–8, 223, 228, 422–3
dynamics 35–8
civil human rights 10, 23
civil-political rights 115–16
civil rights 11, 17–19, 106
civil society 11, 17, 85, 171, 194, 198, 524, 568

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

organisations 171, 173, 194–7, 565
civil status 12, 105
Code of Conduct on Complementarity and Division of Labour in Development Policy 522–3, 526, 531
CoE *see* Council of Europe
coherence 109, 114, 228, 285, 491, 517, 523, 525–7
Coleman case 249–50, 253
collective complaints 84, 87, 96–7, 159, 183, 194
procedure 85, 103, 113, 178, 181, 183, 197
Collins case 422–3, 432
Committee of Ministers 85–6, 178–84, 190–1, 196, 542–3
Committee of Social Rights *see* Social Rights Committee
common objectives 201–2, 207, 215–16, 220–1, 227
communities
national solidaristic 492, 503, 506, 508, 512–13, 573
social security risk 281, 286, 302, 313, 315
solidarity 470–1
community interests, legitimate 114, 132–3
comparability 62–3, 67–8, 246, 253
test 64–5
comparable situations 130, 244, 246–7, 249, 495
compensation schemes 294, 298, 438
competences 163–5, 205, 214–19, 292–6, 312, 464, 521, 571–3
competent authorities 81, 329, 337–8, 357, 359, 369, 396, 421
competition 9, 21, 41, 103, 334, 391–2, 566
competitive knowledge-based economies 275
competitive social market economy 294, 313, 417
competitiveness 223, 311, 313
complaints 68, 72, 74–5, 173, 176, 183–4, 188, 194–5
collective 84, 87, 96–7, 159, 183, 194
procedure 176, 183, 195, 498
collective 85, 103, 113, 178, 181, 183, 197
complementarity 222, 224, 227, 511, 520–3, 526
compliance 99, 155, 171, 176–7, 188–90, 212–13, 219, 432–3
compulsory membership 57, 391–3, 403–4, 411
compulsory social security 91, 158–9
conceptualisation 231, 243, 253
conclusions of non-conformity 90, 182–4, 186, 190
conflict 78, 229, 327, 441, 451–2, 485, 491–3, 572–3
positive 451–2, 485, 488
rules 327–8, 338, 344–5, 350, 352, 355, 380–2, 484
conformity 91, 96, 110, 159–60, 175, 180, 182–7, 192
consensus 76, 180, 193
consistency 180, 228, 240, 251, 521, 527
consolidation 160, 500–1, 506, 561–2, 564–5
constitutional status 415, 440, 572
continental shelf 449
contingencies 29, 149, 151–2, 154, 538–9, 541–2
contract 61, 306, 310, 357, 360–3, 450, 504, 507
individual employment 344, 360–1, 376
social 490–2
contractual relationships 299, 360–1
contributions 54–5, 70, 122–4, 127–30, 203, 330–5, 551–2, 570
individual 107–8
control mechanisms 87, 99, 179, 542–3
Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW) 242–3, 248, 253
convergence 103, 204, 212, 215, 217
Coonan case 323, 327
cooperation 177–8, 195, 197, 292–3, 337, 508–11, 513, 520–2
cross-border 509, 512
development 517–18, 520–1, 523–5, 527, 531
in good faith 337–8
loyal 337, 339–40
partnerships 492, 508, 511–12
sincere 375, 378
coordinated governance 201–29
coordination 201–6, 215–16, 220, 321–3, 340–2, 425–6, 520–4, 566–7
governance 206
hard 201–4
instruments 325, 340, 449, 455, 464–5, 534, 537
law 321, 323, 327, 339–41, 343, 447, 461–2, 464–6
future 341–3
role of principles 338–40
limitations 321–3
model 562, 566–7, 572–3

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

open method of 201–3, 205–9, 212–17, 220–5, 227–8, 265, 566, 569
principles 322–3, 325
regime/system 334, 341, 426, 470, 487–8
Regulation 135–7, 139–43, 322–3, 325–6, 328–30, 332–5, 337–42, 344–5
rules 131, 321–3, 325–6, 334, 339–43, 353, 355–6, 484–6
social security 321, 325, 328, 468, 490, 493–4, 498, 505
principles in EU 321–43
soft 203, 208, 228–9
zones 447, 462, 465
core benefits 117–18
costs 25, 438, 471–2, 477, 492–7, 501–3, 506–7, 509–10
ancillary 495
healthcare 494, 501–2, 505, 507
maintenance 134, 469, 471–2
of treatment 494–5, 497, 501–3, 507
Council of Europe (CoE) 84–6, 112–15, 149–52, 170–2, 177–84, 186–90, 194–8, 539–40
Committee of Ministers 85–6, 178–84, 190–1, 196, 542–3
Council of the European Union 84–6, 149–52, 170–2, 177–81, 186–90, 194–8, 536–7, 539–40
country of residence 68, 130, 135, 332, 335, 376
country reports 188, 201–2, 216–17, 220
Country Strategy Papers *see* CSPs
courts 100, 113, 115–16, 189–90, 217, 219, 358, 360–4
international 125, 144, 176, 189, 192
national 98, 100, 348, 353, 355, 363–4, 433–4, 496–7
credibility deficit 190–1, 198
crisis 84, 94–7, 164, 166–8, 191, 301–3, 565–6, 571–2
cross-border activities 386, 396–7, 405, 410, 451
cross-border cooperation 509, 512
cross-border healthcare 472, 490–3, 495, 497–9, 501, 503–12
cross-border patient mobility 491–3, 498, 500–7, 511–13
CSPs (Country Strategy Papers) 522, 532
cultural rights 20, 22–3, 536, 544
Cyprus 80, 448
Czech Republic 7, 353, 448

Dano case 428, 434, 436–7
DC *see* defined contribution
death 9, 80, 151, 259, 267, 464
decent existence 28, 118, 417
decent housing 16, 18
decision-making capacity 212–13, 216
decommodification 21, 261, 264
deferral 162, 184–6
defined contribution (DC) 399, 408–9
Defrenne 201, 237, 266–7
Defrenne cases 201, 267
degenderization 259
democracy 13–14, 17, 19, 236, 518, 520, 525, 546
social 104, 119, 167
democratic governance 13
democratic society 94–5, 159–60, 241, 491
Denmark 162, 165–7, 189, 204, 264–5, 448, 453, 457
dependent family members 277, 474–5, 481
derogations 87, 94, 238–9, 241, 297, 429, 431, 434–5
destitution 5, 54, 73–4, 82, 413–42, 572
determination of applicable legislation 349–80
developing countries 462, 519–20, 522–3, 525, 527–8, 531–2, 544
development
assistance 522–4
cooperation 517–18, 520–1, 523–5, 527, 531
coordination 519, 522
economic 404, 518, 546, 556, 573
partners 518, 523, 528
sustainable 294, 490, 524
differences of treatment 61–3, 65–7, 69–71, 125–9, 233, 239, 309–10, 313
differential treatment *see* differences of treatment
dignity 8–9, 12, 93–4, 103, 115, 117–18, 407, 439–40
diplomas 473–4
direct discrimination 125–6, 128, 130–1, 135, 137–8, 141, 143, 244
test 130–1
direct reimbursement 494, 503
directives 27, 212, 214, 231–2, 251–3, 272, 292, 455
framework 232, 234–5, 239, 241–2, 244, 249–50, 252, 438
disabilities 232, 235–6, 241–2, 249–53, 281–92, 294–305, 308–11, 313–15
definition 281–3, 309, 327
social model 242, 306, 311
disability benefit 131, 332, 338

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

disability discrimination 249–50
disability policy 284–7, 292, 294, 298, 301–3, 305, 312–13, 315
disabled employees 298, 305, 314–15
disabled persons 249, 253, 275, 342, 439
  concrete measures to promote employment 304–13
  employment 297–8, 303–4, 307, 311, 314–15
  and EU law 289–301
  EU strategies for promoting employment 301–4
  social inclusion 303, 305, 313
  and social security 281–316
  special protection and public international law 287–9
disadvantaged groups 24, 281, 303
discrimination 60–2, 121–4, 133–5, 138–41, 238–45, 251–4, 294–6, 300–1
  age 232, 244, 313
  by association 249–50
  concepts 242–51
  direct 125–6, 128, 130–1, 135, 137–8, 141, 143, 244
  disability 249–50
  grounds 232, 234, 236, 238, 247, 249–52
  on grounds of nationality 133–4, 324, 326, 419, 423, 429, 433, 435
  indirect 128, 130–1, 135–6, 141, 143, 243–6, 300, 326–7
  intersectional 234–5
  multiple 234
  overt 135, 322
  prohibition 60–73
  race 233–5, 249
  sex *see* sex discrimination
dismissals 233, 297, 308, 310–11, 347
disproportionate burden 114, 132–3, 250, 298, 300, 313
disputes 325, 335, 337–8, 360, 363, 369–70, 405, 423
distributive justice 17, 43, 441
diversity 9, 107, 265, 303, 425, 545–6, 569
domestic law 56–7, 61, 72, 75, 80–2, 107, 109, 212
donors 522–4, 526, 528–30
double taxation 404–5
dual-earnings model 271, 276
duties 17–18, 298–300, 314, 480–3, 487–8, 492, 498–9, 550–1

earnings
  previous 149–50, 152–4, 156, 167, 538, 541
  previous standard basic 152–3
earnings-related standards 151–3, 168
ECHR *see* European Convention on Human Rights
economic activity 174, 414–15, 420, 424, 440, 485–6, 569
economic development 404, 518, 546, 556, 573
economic governance 226–7, 566
economic policies 92, 127, 158, 167, 227–8, 275, 416
economic rights 53, 87, 105
ECSR *see* European Committee on Social Rights
ECtHR *see* European Court of Human Rights
education 65–6, 233–4, 288, 290, 292, 469–71, 473–4, 485
EES *see* European Employment Strategy
effective access 161, 288–9, 532, 545
effective participation 242, 283, 287
effectiveness 98–9, 180, 188–9, 195, 197, 202–3, 491–2, 498–9
emergency assistance 63, 108, 124–5, 139
emergency benefits 124–5, 139
employees 249–50, 260–1, 297–8, 306–11, 314, 357–8, 363–5, 391–2
  disabled 298, 305, 314–15
employers
  Belgian 372–4, 376–9
  Netherlands 376–8
employment 222–6, 288–305, 310–11, 313–15, 355–6, 419–23, 481–2, 484–6
  contracts 306, 308–9, 313–15, 361–5, 367, 373–4, 376–9, 381
  of disabled persons 297–8, 303–4, 307, 314
  injuries 7, 24–5, 88, 92, 151–2
  market 134, 430, 432, 483
  minor 329, 342, 354
  rates 290–1, 303
  services 135, 261, 336, 346
EMU (European Monetary Union) 205, 385
enforcement 170, 174, 251, 369, 549
entitlements 20–1, 60–1, 69–70, 107–9, 352–4, 427–8, 475–6, 479–84
equal treatment 231–54, 269–72, 295–8, 325, 422–4, 434–7, 440–1, 456
  definitions 241–2
  enforcement issues 251–2
  exceptions 238–41
  law 231, 241–3, 252, 257–8, 265–6, 268, 270, 272
  migrant workers 92–3
  principle 344, 365, 434–5

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

provisions/rules 139, 201, 322, 326, 341, 347, 418, 421
scope of EU legislation 232–8
watchers 267–8, 277
equality 8–10, 236, 240, 243, 246–7, 250, 253, 270–2
formal 9, 240
principle 8, 107, 231, 236
sex 231–3, 253, 272
substantive 240, 246, 270, 275, 277
symmetric approach to 240, 242–3
ERDF (European Regional Development Fund) 209, 218, 224, 302
ESC *see* European Social Charter
ESF (European Social Fund) 208–10, 218, 224, 294, 302, 304, 311
Esping-Andersen, G 257, 261–5
ethnic origin 12, 232, 238, 241, 251–2, 272
European citizens *see* Union citizens
European Citizenship 43, 133–4, 414–15, 441, 447, 454–5, 572
European Code of Social Security 26, 69, 88–9, 151–2, 170–2, 177–82, 536, 539–42
European Commission 385–6, 389, 394–5, 402, 410–11, 416, 517–18, 569–70
European Committee on Social Rights (ECSR) 84–7, 103, 110–15, 153–60, 178, 180–2, 252, 288
European Consensus on Development 519, 522, 524, 527, 531
European Convention on Human Rights (ECHR) 53–4, 60–2, 66, 74, 103–5, 112–16, 119–23, 141–3
European Council 26, 206, 210, 219–20, 226, 296, 398, 416
European Court of Human Rights (ECtHR) 53–82, 84–5, 103–4, 112–15, 138, 140–1, 143–4, 189
case law 123–33
and EU Court of Justice 121–44
European Employment Strategy (EES) 205, 208–10, 214–17, 221–8, 273–4, 346
European External Action Service 523, 527, 532
European integration 202–4, 211–12, 387, 440–1, 490, 561, 563, 573
European Monetary Union *see* EMU
European Parliament 220, 292, 466, 468, 523, 527, 568–9, 571
European pensions union 385–411, 573
European Reference Networks 508, 510–12
European Regional Development Fund *see* ERDF
European Semester 203, 207–9, 222, 226, 416, 566
European Social Charter (ESC) 26–7, 84–5, 112–15, 149–54, 156–7, 164–5, 170–2, 184–7
and EU law 163–5
European Social Fund *see* ESF
European social security law
future 561–74
as source of inspiration 534–56
European social security standards, development 149–68
European Union
Council *see* Council of the European Union
Court of Justice, and European Court of Human Rights (ECtHR) 121–44
European Commission *see* European Commission
European Council *see* European Council
European Parliament *see* European Parliament
and social solidarity 44–8
Europeanisation 13, 84
exceptional threshold test 78
excessive burden 59, 142, 294
exchange of information 164, 303, 566
exclusion *see* social exclusion
exclusive effect 328, 330–1, 349–50, 376, 486
principle 328–30, 339–40
expectations, legitimate 56–8, 90, 161, 409, 551, 553–4
expert committees 172–4, 180–1, 190, 192–4, 196–8
independent 86, 183, 188, 192, 196–7
supervising 172, 180
export clauses 461–2
expulsion 10, 77–8, 436
extra-national scope 447–8, 458
extra-territorial application 449, 451, 454
extra-territorial effect 451–3, 466
extra-territorial scope 447–8, 454

fair balance 58–9, 132, 431
familialism 263, 265
families 81, 151–4, 259–60, 262, 274–5, 351–3, 454–7, 466–7
family allowances 69, 99, 110, 130, 133, 326–7, 335
family benefits 149, 322, 327, 329–30, 350–5, 468, 470, 484–7
family life 61, 105, 107, 150, 161, 274–5

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

family members 322, 419, 421, 425, 434–5, 456, 458, 475–7
  dependent 277, 474–5, 481
  inactive 424–5
family reconciliation policies 258, 265
farmers 6, 126–7, 140
fathers 72, 105, 107, 140, 240, 268
  adoptive 126
  natural 105
FEAMD *see* Fund For European Aid to the Most Deprived
fees 65–6, 80–1, 162, 168, 348, 501, 504
feminists 267–8, 270–1
femocrats 263, 267, 276–7
financial aid 421, 469–88
  laws 470, 484, 486, 488
  systems 468, 470–3, 480, 487, 572
  tourism 472, 478, 480
financial burden 300, 440, 479, 487, 492, 500, 512, 572
financial incentives 316, 505, 565
financial support 204, 208, 218–20, 276, 348, 422, 469, 477
financing 56, 418, 421, 470–1, 502, 509, 529, 545–6
Finland 12, 166–7, 264–5, 287, 448
First Pillar 387, 389–90, 571
Fitzwilliam case 357
flagship initiatives 207, 210, 301, 568
food 22, 77–9, 224, 420, 439–40
foreign workers 46, 135, 325, 331
foreigners 11, 93, 126, 128, 130, 136, 138, 326
formal equality 9, 240
Förster case 134, 138, 325
fragmentation 519, 522, 561–2, 564–5
framework directives 232, 234–5, 239, 241–2, 244, 249–50, 252, 438
France 63, 126, 135, 261–2, 264, 322, 353, 457–9
Franzen case 354
free movement 321–5, 328–33, 337–43, 350–2, 413–14, 434–8, 440–1, 490–2
  of patients 496, 504
  rights 414, 468, 478
  of students 468, 473, 475, 485, 488
  of workers 337–8, 355–6, 375, 380, 382, 423–4, 452, 488
freedom of movement *see* free movement
frontier workers 135, 141, 333, 365, 372, 421–2, 479, 481
  unemployed 135, 141, 333
functions 5, 44–7, 154, 275, 277, 297, 321, 325
  social 391–3, 403
Fund For European Aid to the Most Deprived (FEAMD) 209, 218, 224, 227, 440–1, 569
fundamental freedoms 5, 103, 115, 117, 136, 164, 287, 289
fundamental social rights 14, 19, 85, 115, 152, 163, 562, 572
funding 89–91, 209–10, 220–1, 311, 401–3, 503–4, 528, 569–70
  requirements 396, 401–2

Gaygusuz case 55, 62–3, 66, 108, 123–5, 128, 136, 139
gender 12, 22, 258–66, 269, 271–4, 277, 530, 537
  equality 236, 260, 263–4, 266, 272–3, 275, 525, 544
  mainstreaming 250, 258–9, 271–2
  and social security 265–76
genuine link 369, 430, 432, 435, 475–6
Germany 162, 166–7, 329, 350–2, 354, 363–4, 421, 452
  family benefits 350–1
  Federal Constitutional Court 65, 118
  law 64, 329, 348, 350, 354–5, 450
Geven case 421–2, 437
Giersch case 421–2, 437, 476, 479–80, 482–3
globalisation 42–3, 168, 171, 302, 519, 527, 531, 547
good faith 57, 114
  cooperation in 337–8
good governance 394, 518, 524–5
goods 8, 21, 232–5, 238, 242, 244, 252, 440
Gottardo case 459, 461–2, 465
Gottardo principle 461, 465
governance 14, 201–29, 385, 391, 562, 565, 567–8, 573
  of coordination 206
  democratic 13
  economic 226–7, 566
  framework 207–8
  good 394, 518, 524–5
  initiatives 203, 208, 228
  instruments 202, 208–9, 562
  models 561–2, 566
  regulatory 568
  structure 205–6, 208, 214, 216, 220, 222, 228
government reports 173, 175–6, 178–9, 181–2, 196

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

governments 96–7, 126–7, 174–9, 182–3, 190–1, 194–5, 527–30, 567–8
national 518, 522, 528–30, 566
graduates 476, 482–4, 529
graduation 471, 474–6, 480–2, 485, 488
grants 68–9, 353–5, 427, 434, 469, 471–2, 477–8, 487
study 133, 421, 468, 475, 477, 479, 573
Gravier case 487
Greece 74–5, 77, 96–8, 106, 160, 162, 164, 168
growth 157, 206, 222–3, 303, 387, 491, 518
smart, sustainable and inclusive 206, 209, 301, 303
Grzelczyk case 415, 432
guarantees 4, 23, 28–9, 156–7, 313–15, 399–402, 535–6, 544–5

harassment 249–50
sexual 243, 249
hard coordination 201–4
hard law 170, 312
centralism 562, 573
instruments 212, 257, 272, 276
measures 203, 265, 470
harmonisation 292, 322–3, 385–7, 518, 524, 536, 562, 566–7
instruments 536–7
minimum 220, 388
negative 491, 493, 500, 507–8, 512
health 12, 14, 20, 22, 94, 96, 312, 504–5
care *see* healthcare
good 6, 12, 20
insurance 281, 285, 456, 509–10
healthcare 18, 61, 79–82, 490–1, 493–5, 497–8, 501–8, 510–13
authorities 513, 573
cross-border 472, 490–3, 495, 497–9, 501, 503–12
market 491–3, 498, 506, 508, 511
providers 492–3, 498–9, 506–8, 510
provision 490, 492, 504–6, 508–9, 512–13
services 492, 500, 504–5, 510
cross-border 493, 506, 511
systems 491, 500, 502–3, 506–7, 512, 572
Hendrix case 332, 342, 428
highly qualified third-country workers 455–6
home countries 396, 403, 414, 455–6, 462, 469–74, 485, 488
homecoming, requirements 483–4, 488
hospitals 16, 80–1, 495, 504–5, 509–10
host States 342–5, 347–8, 356–9, 365–8, 370–1, 421–5, 427–38, 469–72
housing 14, 18, 22, 75, 79, 98, 161, 439
assistance 28, 117–18, 417, 424–5
decent 16, 18
social 53, 66, 210
Hudzinski and Wawrzyniak case 351–4, 366
human dignity *see* dignity
human rights 3–4, 10–15, 17–23, 114–15, 119–23, 126–8, 140–4, 163–4
civil 10, 23
classical 15, 572
instruments/legislation 4, 12, 26, 28–9, 103, 114–15
international 4, 11–12, 20
as international principles 10–12
international turn 8–14
perspective 3–4, 132
to social security 4, 25, 28–9, 170, 195, 197–8, 544, 568
Hungary 37, 128, 448
hybrid structures 203, 214, 221–8, 504–5
hybridity 223, 226–8
hygiene 77–8

Ibero-American Multilateral Agreement on Social Security 460, 465
Ibrahim case 424–5
Iceland 131, 449, 457
ICESCR *see* International Covenant on Economic, Social and Cultural Rights
ill-health 54, 73, 79, 82, 153
illness 28, 78, 90, 117, 282–3, 291, 309–10, 423–4
ILO (International Labour Organization) 24–5, 84, 149, 170–8, 188–91, 193–7, 534–5, 537–8
Committee of Experts 172, 178–82, 186, 189–90, 198
Conventions 69–70, 149–51, 153–4, 170–2, 177–9, 182, 466–7, 544
ILO, tripartite structure 171, 191–2, 194
immigrants 87, 92, 437, 568
illegal 65, 76, 94
immigration status 62, 64–8
inactive family members 424–5
inactive migrants 422, 425, 430–1, 436, 441
inactive persons 423–4, 426, 428, 431, 433, 437–8
inactive Union citizens 414, 428, 434–6
incentives 166, 203, 207, 305–6, 314–15, 346, 505–6, 513
financial 316, 505, 565
inclusion *see* social inclusion
income protection 124, 261, 275, 277, 564

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

income security 25, 260, 313, 315, 552, 567
  basic 532, 545
  earnings-related 149
income-substituting benefits 90, 155
income taxes 364, 379, 450
  unlimited 351–4
incomes 7, 132, 153–6, 159–61, 259, 290–1, 330, 404
  average 290–1, 315, 538
  basic 260, 532, 545, 565
  capital 155–6, 159
  median equivalised 111–12, 155–6, 185
  minimum 149, 155, 161, 342, 418, 438–9, 536, 571
  net median 153, 155–6
  social 26, 154–7, 164
independent expert committees 86, 183, 188, 192, 196–7
indexation 69–70, 130
India 534, 545–7
indifference 188, 195
  official 74–5
indigent migrants 414, 418–19, 421, 437–8, 440–1
indirect discrimination 128, 130–1, 135–6, 141, 143, 243–6, 300, 326–7
  test 131, 245–6
individual employment contracts 344, 360–1, 376
individual responsibility 548–50, 552, 554–5
individual rights 4, 13, 21, 90, 161, 429, 511–13
information 158, 173–9, 182–3, 194, 336–7, 396–7, 498–9, 543
  accessibility 498–9
  exchange 164, 303, 566
  relevant 394, 410, 498–9
informed choice 492, 495, 498–9
infringements 132, 136, 141–4, 173, 190, 196, 330, 332
institutional surveillance 217–19
institutions 212–13, 216–17, 337, 400, 402, 468–70, 519–20, 570–1
  social 12, 14–15, 391
Institutions for Occupational Retirement Provision *see* IORPs
insurance 335, 338, 354, 446, 453, 459, 461–3, 465
  companies 387, 402–3, 507
  social 5, 7, 16, 23–4, 259, 546, 550, 555
  unemployment 63, 124–5, 284, 286, 570–1
insurers 388, 390, 399–401, 403, 409–10, 506–7, 511
  commercial 391–2, 399
integration
  capacity 212–14, 218–21, 224
  instruments 208, 217, 221, 223
  technique 212, 215–16, 220
interference 41, 55–8, 61, 105, 110, 194, 429, 495
intergenerational solidarity 210, 546, 555
internal market 215, 386, 389, 394, 397, 417, 421, 491
international agreements 11, 96, 151, 164, 195, 287, 289, 459
International Covenant on Economic, Social and Cultural Rights (ICESCR) 22–4, 120, 535–6, 539, 544
International Labour Organization *see* ILO
international law 4, 19–20, 53, 69, 94, 164, 170, 535–6
international obligations 96, 99, 115, 188–9, 196, 289
international organisations 171–2, 179, 183, 189, 340, 466, 523
international social security standards 170, 187, 193, 198
interpretation 105–6, 116–18, 120–2, 185–6, 191–3, 237–9, 339–40, 432–6
  strict 434–5
intersectional discrimination 234–5
invalidity 7, 9, 88, 92, 151–2, 260, 379, 538–9
  pensions 294, 315
invalidity benefits 63, 91–2, 149, 268, 461, 542
investments 166, 198, 224, 228, 399, 405, 408, 417
IORPs (Institutions for Occupational Retirement Provision) 386–92, 394, 396–405, 408–11
Ireland 37, 105, 262, 264–5, 287, 323, 448
Italy 7, 78, 111, 264, 448, 459

jobseekers 346, 348, 422–3, 437
judiciary 171, 382, 564–5, 568
justice 47, 144, 252, 257, 270, 277, 471, 480
  distributive 17, 43, 441
justiciability 15, 100, 116

labour law 260–1, 344–5, 357–8, 360–1, 366–8, 371–2, 379–82, 396–8
  applicable 360, 364, 372, 376
  and Regulation 883/2004 345–9
labour market 257–8, 260–2, 281–4, 287–9, 292–3, 301–5, 310–12, 346–8

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

regular 281, 284, 313
labour market policies, active 222, 346
last-resort social assistance 162, 168
Laval case 46, 368
legal bases 136–7, 140, 204, 215, 219, 322–3, 373, 394
legal orders, national 171, 212–13, 217, 220, 228
legal residence 66, 431–3, 457
legal status 19, 32, 35, 39–40, 43
legal uncertainty 341, 397, 433–4
legitimate community interests 114, 132–3
legitimate expectations 56–8, 90, 161, 409, 551, 553–4
Lewis, J 261–5, 273, 275
lex loci laboris 331, 344, 356, 364, 380, 451, 484
liberty 8, 10, 475
Lisbon Strategy 205–6, 223, 225, 228, 293, 416
living conditions 13, 29, 74–9, 106
adequate 73, 75–6, 82
loans 468–9, 471, 473, 475, 477–9, 482–3
long-term benefits 152, 331
long-term residence status 456
loyal cooperation 337, 339–40
Luczak case 64, 126, 128, 140
Luxembourg 7, 264, 338, 421, 448, 479, 501

mainstreaming 250, 272–3, 285, 525
gender 250, 258–9, 271–2
maintenance, costs 134, 469, 471–2
maintenance aid 431, 469–72, 474, 476, 483, 486, 488
margin of appreciation 58, 60, 62, 65, 67, 109–10, 125, 129–30
markets, labour 257–8, 260–2, 281–4, 287–9, 292–3, 301–5, 310–12, 346–8
Martínez Sala case 134, 326, 433
maternity benefits 90–1, 149, 153, 353
median equivalised income 111–12, 155–6, 185
medical assistance 84, 96, 112, 288, 540, 550
medical care 6, 22, 149, 151, 282, 438, 503, 541
medical model 242, 253, 281–3
medical treatment 18, 80–2, 282, 438, 490
Member State of residence 40, 329, 350, 358, 427–8, 432, 438, 496–7
Member State of treatment 494–5, 498–9, 502–3, 507
membership 6, 22, 112, 233, 236, 466, 470, 511–12
compulsory 57, 391–3, 403–4, 411
mergers 180–1, 221, 224
migrant workers 329–30, 335–8, 351–2, 356, 375, 380–2, 421–5, 447
migrants 418–19, 428–9, 431, 437, 446–7, 462, 464, 536
inactive 422, 425, 430–1, 436, 441
indigent 414, 418–19, 421, 437–8, 440–1
from outside Europe 446–67
migration 76, 414, 437, 446, 457–8, 527, 546, 555
criterion 448, 456–8
minimum harmonisation 220, 388
minimum incomes 149, 155, 161, 342, 418, 438–9, 536, 571
minimum pensions 111, 155, 567
minimum standards 118, 147, 149–50, 152, 154, 156, 170–2, 538–9
minimum subsistence benefits 414, 418–19, 422, 426, 429
minimum thresholds 159, 162, 164–5
minor employment 329, 342, 354
minorities, national 60–1, 123, 236
mobile patients 492–3, 500, 505, 507, 512
mobile workers 344, 355, 381
mobility, patients 490, 493, 498, 500–3, 505–7, 509, 511–13, 572–3
Moskal case 57, 59
motherhood, ideology 239, 267, 276–7
mothers 66–7, 80, 239–40, 264, 267–8, 424, 477, 535
multilateral agreements 26, 88, 110, 150, 448, 461–2, 465
multilateral social security agreements 92, 447, 460, 466
multiple discrimination 234
mutual request 359, 364, 380

nation states 11–14, 38, 43, 47, 506, 563
national activation measures 347–8, 382
national anti-cumulation rules 477–8, 484
national authorities 57–8, 99–100, 109, 375, 433, 493–4, 497, 499
national courts 98, 100, 348, 353, 355, 363–4, 433–4, 496–7
national governments 518, 522, 528–30, 566
national healthcare contract 501, 512, 572
national legislation 4, 324, 327–8, 332, 337, 342–3, 351–2, 495
national minority 60–1, 123, 236
national ownership 528–9, 532
national policies 201–2, 204, 217–18, 220, 417

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

National Reform Programmes (NRPs) 226
national rules 238, 339, 349, 471, 473, 483
national schemes 322–3, 325, 335, 342, 568, 570
national security 94–5
national solidaristic community 492, 503, 506, 508, 512–13, 573
national solidarity 16, 39, 42
national territory 323, 472, 475–6, 486
national workers 135, 331, 347, 356, 365, 370, 380–1
nationality 22, 35–7, 40, 62–8, 122–3, 128–30, 133–8, 454–7
  condition 63, 122, 125–6, 136, 138
  differences of treatment based on 62, 233
  discrimination on grounds of 133–4, 324, 326, 419, 423, 429, 433, 435
  prohibition of discrimination on grounds of 419, 423, 426, 429, 433, 435, 455, 461
natural fathers 105
negative conflict 451, 468, 485
negative harmonisation 491, 493, 500, 507–8, 512
negative obligations 100–1, 105
neighbouring Member States 476, 479, 482, 487
neo-liberalism 165–6
net median income 153, 155–6
Netherlands 350–1, 354, 363–4, 371–9, 386–93, 398–9, 450, 476
  employers 376–8
  legislation/law 234, 330, 345, 348, 354, 363–4, 371, 373–9
  pension funds 388, 391–2, 399–401, 404
  Pensions Act 398, 400
  sickness benefit 372–5, 377–9
  social security 355, 372, 564
NGOs (non-governmental organisations) 18, 119, 183, 196–7, 252, 311, 529
non-competent Member State 352–4
non-compliance 99, 112, 170, 186, 188, 192–3
non-conformity 90, 182–6, 190
non-contributory benefits 92, 342, 429
  special 331–2, 336, 342, 426–8, 433, 435
non-discrimination 122, 133, 235–7, 323, 325–6, 448–9, 457, 459
  see also discrimination
  clauses/provisions 110, 112, 122, 139, 462
  on grounds of nationality 325, 414, 448, 454, 459, 466
  place and applicability of rules in EU law 133–7
  principle 135, 325, 331, 450
  rule 122, 124, 126, 136–8, 326, 339, 451, 458
non-governmental organisations *see* NGOs
non-nationals 16, 63–4, 68, 82, 93–4
non-resident children 481–3, 487
non-resident students 474–6, 482
non-resident workers and children 480–2, 488
non-residents 61, 70, 82, 129, 475, 477, 480
NRPs (National Reform Programmes) 226

objective justification 133, 245–6, 253
objectives
  common 201–2, 207, 215–16, 220–1, 227
  social 227, 229, 410–11, 571
obligations 81–2, 96–8, 110–11, 250–2, 373–8, 399–401, 464–6, 550
  international 96, 99, 115, 188–9, 196, 289
  negative 100–1, 105
  positive 17, 54, 73–82, 90, 100, 105
occupation(s) 128, 247, 283, 295–7, 301, 305, 313, 421
occupational pension schemes 245, 386–7
occupational schemes 88, 233, 382, 389, 408
occupational social security schemes 232–3
old age 5–7, 9, 88, 92, 151–2, 259–60, 354–5, 452
old-age benefits/pensions 92, 96, 149, 155, 276, 324, 453–4, 459
OMC *see* Open Method of Coordination
open method of coordination 201–3, 205–9, 212–17, 220–5, 227–8, 265, 566, 569
Open Method of Coordination (OMC) 201–10, 212–17, 220–8, 251, 265, 273, 285, 293
overseas territories 448–9
ownership 518, 528–9
  national 528–9, 532

Pan African Programme (PAP) 525
parent-workers 476, 481–2, 485, 487
parents 94, 237–8, 240, 268, 335, 424, 476, 482–7
part-time work 244, 253, 262
part-time workers 245, 269
participation, effective 242, 283, 287
partnership agreements 460, 462, 518
partnerships, cooperation 492, 508, 511–12
patient mobility, cross-border 491–3, 498, 500–7, 511–13
patients 80, 82, 490–501, 503–8, 510, 512–13, 543, 573

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

mobile 492–3, 500, 505, 507, 512
mobility 490–513, 572–3
rights 490, 492, 498, 506, 508, 511, 513
PCD *see* Policy Coherence for Development
peaceful enjoyment of possessions 54, 58–9
pension funds, industry-wide 391–2, 400, 404
pension systems 72, 130, 160, 233, 385–8, 404
pensioners 68–9, 97, 111, 129–33, 159–61, 275–6, 342, 352
pensions 58–9, 68–9, 111, 129–33, 207–9, 402–5, 409–11, 453–4
entitlements 90, 161, 387, 398–9, 401
minimum 111, 155, 567
old-age 92, 96, 149, 155, 276, 324, 453–4, 459
retirement 69–70, 130, 387, 434
union 385, 387, 410–11, 573
Personal Pension Plan *see* PPP
personal scope 54, 90, 136, 140, 268–9, 460, 474, 502
Petrovic case 72, 107–8, 268
place of residence 62, 68, 70, 129, 153, 453, 468, 476
Poland 64, 126–7, 140, 351, 448
Policy Coherence for Development (PCD) 522–3, 527, 531
policy fields 204, 208–10, 213, 215, 218–19, 221–3, 228
political bodies 172, 183, 188, 190, 192, 196, 198
Ponomaryovi case 65, 68
portability 471–4, 477, 480–1, 483, 487
portable aid 469, 472–7, 480–3, 487–8
portable aid programmes 469, 476
Portugal 85, 265, 352, 448, 460, 465
positive action 236, 238, 240–1, 247–8, 253, 272, 298, 549
positive conflict 451–2, 485, 488
positive obligations 17, 54, 73–82, 90, 100, 105
possessions, peaceful enjoyment of 54, 58–9
posted workers 343–5, 365–70, 378–81
posting 333–4, 356–9, 369–70
provisions 356–8
rules 332–3
poverty 208–10, 221–2, 225–6, 284–5, 291, 301–3, 416–17, 568–9
at-risk-of-poverty threshold value 155, 186
extreme 77, 79
and social exclusion 201, 207–10, 221–2, 224, 226, 228, 413–14, 416–18
trap 281, 285
power shifts 563, 565
PPIs (premium pension institutions) 388, 390
PPP (Personal Pension Plan) 386, 407–8, 410–11
predictability 350, 352–3, 355, 503
preferential treatment 40, 65, 127
pregnancy 239, 244, 260, 268, 270, 423
premium pension institutions *see* PPIs
previous earnings 149–50, 152–4, 156, 167, 538, 541
prior authorisation 493–7, 506
private providers 504–5
private sector 248, 296, 348, 503–5
privatisation 165–7, 187, 504–5, 546, 565
professional life 242, 274, 283
progressive development 27, 89–92, 157, 160
property 8, 54, 56, 60–1, 123, 131, 143–4, 150
protection of 123–4, 131–3, 136, 142, 170, 298–9, 552–3
rights 54–60, 124, 131–2, 142, 144
proportionality 59, 62–3, 66, 125–7, 129, 138, 298, 551
reasonable relationship of 62–3, 125, 129
test 348–9, 429, 434–6, 551
providers *see* service providers
prudential requirements 396–7
public administration 3, 7, 12–13, 311, 561–2, 573
public authorities 61, 154, 345, 390, 433
public funds 66–7, 81, 111, 336, 420
public health 14, 94–5, 133, 325
public interest 94–5, 109, 123, 125, 299–300, 361, 366, 371
public savings 158, 167
public security 241, 325
public services 65–6, 155, 162, 165–6, 168, 315

quality framework 210, 219–20
quotas 247, 286, 304–7, 311–12, 314

race 9, 60–1, 123, 232–6, 238–41, 244, 252, 537
discrimination 233–5, 249
race to the bottom 44–5
ratification 88–9, 151–2, 154, 184, 186, 195, 446, 540
reasonable accommodation 250, 286, 288, 297–8, 300, 309, 312–14
reasonable relationship of proportionality 62–3, 125, 129

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

reciprocity 325, 512, 548
  agreements 63, 126
  principle 325
recovery, systems 400–1, 411
recruitment 91, 245, 247, 297, 309–10
reforms 86, 89–90, 92, 95–6, 100, 158, 399, 551–5
  procedural 171
  social 164, 206
  structural 180–1, 398
refugees 67–8, 74, 77, 136–7, 458
regions 446–7, 462, 464, 466, 504–5, 509, 518, 522
regression, social 544, 549, 555
regular labour market 281, 284, 313
regular supervision procedure 173–4, 178
reimbursement 369, 438, 493–7, 502–3, 505–7
  of costs 494, 499, 510
  direct 494, 503
  system 342, 438, 505
  transactions 492, 508, 511–12
reinstatement 262, 347
religion 60–1, 232, 235–6, 241, 244, 250–2, 295, 300
remuneration 9, 311, 346–7, 358, 420
  see also incomes; salaries; wages
representations 173, 176, 194–5, 463
representatives 86, 175, 179, 190, 267, 391, 395, 522
residence 39–40, 326–7, 332–3, 355, 426–8, 434–5, 477–80, 484–7
  conditions 68, 70, 128–9, 131, 135, 141, 326, 427
  legal 66, 431–3, 457
  legal right of 432–3
  Member State of 40, 329, 350, 358, 427–8, 432, 438, 496–7
  period of 433–5
  permits 64, 136, 431–2
  place of 62, 68, 70, 129, 153, 453, 468, 476
  requirements 92, 326, 475–6
  rights 419, 424–5, 428, 431–2, 435, 437, 478
  schemes 328–9, 331
resident students 474–5
residents 62–3, 93, 134, 326–7, 350, 353–4, 452–3, 538
resources 17, 76, 80, 111, 260, 511–12, 550, 569
  sufficient 28, 78, 118, 413, 417, 428, 431, 434–6
responsibility 75–6, 79, 81–2, 373–4, 487–8, 490, 492, 550
  individual 548–50, 552, 554–5
  shared 441, 568
  social 18, 134
  state 74–6, 82, 471
retention of benefits/rights 26, 88, 92, 110–11, 428, 431
retirement
  benefits 393, 404–5, 410
  pensions 69–70, 130, 387, 434
  provisions 385–6, 388–91, 411
return home 474–6, 480, 483–4, 488
rights
  civil-political 115–16
  economic 53, 87, 105
  individual 4, 13, 21, 90, 161, 429, 511–13
  patients 490, 492, 498, 506, 508, 511, 513
  ratione personae 93
  residence 419, 424–5, 428, 431–2, 435, 437, 478
  social 7–10, 12–14, 16–22, 28–9, 38–40, 84–7, 112–15, 153–60
  to social security 7–8, 18–19, 22–3, 26–9, 84–5, 88, 103–4, 150–1
  subjective 100, 543, 550
Ring/Werge case 283, 299, 308–10, 313, 315
risks 9, 79–80, 352, 364, 477–9, 538, 541, 548
  social 7, 9, 19, 22, 257, 260, 552–3, 555
Romania 7, 80, 162, 448, 496
Romas 98, 253
Rome Convention on the law applicable to contractual obligations 344, 360, 362–3
Russia 74, 106–7, 534, 545–7

safety 11, 117, 292, 297, 312
safety nets 39, 91, 113, 342, 371, 525, 528
salaries 159, 309, 364, 371–9, 381
sameness 270–1
Schlecker case 360, 363, 365, 373, 379–80
SCPs (Stability and Convergence Programmes) 226
search functions 180, 185
Second Pillar 387, 389–90, 404, 408, 571
security
  national 94–5
  principle 548–9, 551–2, 554–5
  public 241, 325
self-employed activities 330
self-employed workers 261
self-employment 28, 194, 233–4, 297

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

sending states 331, 357–9, 365, 368, 370, 381, 463
Şentürk case 80–1
service providers 366–7, 369, 371, 380, 390–1, 408, 410, 493
services 232–5, 344–5, 365–8, 370–1, 380, 406, 490–3, 503–4
  public 65–6, 155, 162, 165–6, 168, 315
sex 60–2, 73, 232, 239–41, 244–5, 249, 251–3, 258
sex discrimination 71, 233–8, 241–4
  direct 244
  indirect 234, 246
sex equality 231–3, 253, 272
sexual harassment 243, 249
sexual orientation 232, 236, 241, 244, 249, 251–2, 295, 300
SGP *see* Stability and Growth Pact
shared responsibility 441, 568
sickness 6, 9, 88, 151–2, 259–60, 371–4, 376–9, 381
sincere cooperation 375, 378
single state rule 454, 468
skilled workers 152–3, 538–9
smart, sustainable and inclusive growth 206, 209, 301, 303
social assistance 103, 117, 133–4, 138–9, 161–3, 341–2, 425–9, 431–5
  benefits 136, 167, 269, 429, 434–5, 438
  last-resort 162, 168
  systems 43, 413, 418, 428, 431, 434, 436–7, 440
social benefits 63–6, 68, 154, 413, 421, 423, 425, 432–7
social citizenship 13, 16, 32, 38–42, 44, 275
social contract 490–2
social democracy 104, 119, 167
social exclusion 166–7, 203–10, 221–2, 228, 286, 292–4, 413–14, 416–18
  and poverty 201, 207–10, 221–2, 224, 226, 228, 413–14, 416–18
social housing 53, 66, 210
social human rights 3, 10, 12, 14–22, 27, 29, 164, 193
social inclusion 205, 207–11, 213, 215–16, 222–5, 288–9, 311, 416–17
  active 209, 219, 221–2
social income 26, 154–7, 164
social institutions 12, 14–15, 391
social insurance 5, 7, 16, 23–4, 259, 546, 550, 555
  benefits 89, 149, 270
social investment 208–10
social objectives 227, 229, 410–11, 571
social partners 99, 179–80, 194, 196–8, 251–2, 311, 404, 565
social policy 202, 206, 227–8, 257, 263, 265, 270–2, 277
social progress 27–8, 294, 313, 331, 417, 544–5, 555
social protection 23–8, 208–11, 355, 517–20, 523–6, 528–32, 543–6, 556
  EU promotion in the world 517–32
  policies 204–5, 327, 530
  support 519, 525–6, 528, 531
  systems 17, 22, 95, 204–5, 219, 294, 528, 571
social reforms 164, 206
social regression 544, 549, 555
social responsibilities 18, 134
social rights 7–10, 12–14, 16–22, 28–9, 38–40, 84–7, 112–15, 153–60
  fundamental 14, 19, 85, 115, 152, 163, 562, 572
Social Rights Committee 84–101, 110, 151, 153–60, 178, 180–92, 195, 197
  interaction with European Convention on Human Rights and national courts 98–119
social risks 7, 9, 19, 22, 257, 260, 552–3, 555
social security
  acquis communautaire 39, 211–22, 265–6, 270
  agreements 13, 68–9, 446, 448, 454, 459–60, 462, 467
    multilateral 92, 447, 460, 466
  benefits 55–6, 60–1, 68, 70, 89–90, 107–8, 155–6, 426–7
  compulsory 91, 158–9
  concept 5–8
  contributions *see* contributions
  coordination 321, 325, 328, 468, 490, 493–4, 498, 505
  definition 149, 257, 427
  and disabled persons 281–316
  human right to 4, 25, 28–9, 170, 195, 197–8, 568
    as international and European guarantee 22–8
  institutions 4, 16, 324, 356–7, 373, 379–80, 382, 460
  law 257, 259, 446–9, 454–6, 458, 534–5, 547–9, 553–4
    general principles of 547, 549
    international 446, 535

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

legislation 88–9, 349–51, 357–8, 371–5, 377–8, 380–1, 536, 551
for mobile workers and labour law 344–82
as multifaceted institution 3
in new context 165–8
policy 201, 209, 211, 213, 221, 227
reforms 158, 501, 551, 553
rights 6–8, 18–19, 22–4, 26–9, 88, 103–4, 466–7, 552–3
risk community 281, 286, 302, 313, 315
rules 276, 505, 508
schemes 54, 56–7, 60–2, 64, 68, 70, 82, 321–3
and social justice 8–10
standards 170, 185, 187, 189, 194, 196–7, 537, 554–5
systems 7–8, 26–7, 88–90, 154, 157–60, 337–8, 544–7, 566–8
and women 231, 257–77
social services 21, 26, 28, 42, 44, 117, 163, 210
social solidarity 5, 9, 32–5, 39, 41–3, 48, 490–1, 505
and European Union 44–8
social status 12, 22, 302
social transfers 207, 291, 302, 529–30
social welfare states 13, 281, 284, 286, 313
soft coordination 203, 208, 228–9
soft law 99, 171, 212, 257, 408–9, 562
instruments 213, 271, 409, 470
solidarity 16, 32, 34, 392–3, 441–2, 545–6, 548, 554–5
benefits 332, 334, 342
and citizenship in Europe 32–48
community 470–1
intergenerational 210, 546, 555
national 16, 39, 42
principle 28, 116, 342, 392, 398, 404, 555
rights 116
social 5, 9, 32–5, 39, 41–4, 48, 490–1, 505
unity and state 43–4
solvency 385, 387, 390, 394, 399, 401–2, 410
Somalia 77–8
sovereignty 19, 53
Spain 264, 446, 448–9, 452, 460–1, 465, 496, 501
special non-contributory benefits 331–2, 336, 342, 426–8, 433, 435
spouses 9, 71, 276, 456
Stability and Convergence Programmes (SCPs) 226
Stability and Growth Pact (SGP) 226–9
standard beneficiaries 152, 538, 542
standard-setting instruments 534–7, 539, 542, 545, 547, 550, 555–6
standards 149–51, 162–5, 170–1, 184, 194–7, 541–3, 549, 553–6
earnings-related 151–2, 168
minimum 118, 147, 149–50, 152, 154, 156, 170–2, 538–9
state-of-employment principle 332–5
state-of-residence principle 331, 333
state responsibility 74–6, 82, 471
state subsidies 304, 311
stateless persons 136–7
states, decisive role in supervision 184–8
status 60–1, 67, 321, 414–15, 422–6, 429, 448, 459
civil 12, 105
constitutional 415, 440, 572
immigration 62, 64–8
legal 19, 32, 35, 39–40, 43
long-term residence 456
social 12, 22, 302
statutory schemes 133, 136, 138–9, 233, 246, 345
Stec case 55–6, 60, 71–2, 108–9, 114
Stefanetti case 59, 111
Steymann case 420
Stjerna case 105
strict interpretation 434–5
structural funds 302, 440–1, 510, 569
structural reforms 180–1, 398
students 134, 350, 431–2, 437, 454, 468–88, 572
free movement 468, 473, 475, 485, 488
mobility 469, 471, 477, 483
national 470–2
non-resident 474–6, 482
resident 474–5
study grants 133, 421, 468, 475, 477, 479, 573
sub-Saharan Africa 517, 519, 528–30
subjective rights 100, 543, 550
subsistence 90, 161, 420, 427, 436, 439
level 89, 153
substantive equality 240, 246, 270, 275, 277
sufficient resources 28, 78, 118, 413, 417, 428, 431, 434–6
Sufi and Elmi case 75, 77–8
supervising bodies 170–1, 179, 184, 188, 194
between law and politics 189–93
supervision 84–6, 170–1, 173, 177–8, 180, 192–3, 196–7, 395–6
cycle 86, 162
effective 172, 192, 196

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

of social security standards 170–98
supervisory bodies 151, 162, 171–84, 188, 190–1
supervisory mechanisms/procedures 86, 171–2, 180, 190–1, 193–4, 196, 198, 542
supervisory systems 171, 173, 177, 188–9, 194, 196
supplementary benefits 90, 155
support
donor 525, 528
financial 204, 208, 218–20, 276, 348, 422, 469, 477
supranational model 562, 570, 573
Sürül case 326
survivors 88, 92, 133, 137, 149, 151–3, 457, 571
sustainability 89, 158, 294, 385, 389, 399, 411, 528–9
sustainable development 294, 490, 524
Sweden 7, 100, 127, 166–7, 261–2, 264–5, 446, 448
Switzerland 7, 85, 449, 459
symbiosis 492–3
symmetric approach to equality 240, 242–3

taxation 55–6, 91, 108, 159, 265, 404–5, 408
double 404–5
technical assistance 84, 197, 220, 528, 531–2
Teixeira case 424–5
Ten Holder case 328–9
territoriality 36, 492
TFEU *see* Treaty on the Functioning of the EU
Thailand 452
third countries 137, 140, 447–8, 457, 459, 461–2, 466, 518–22
third-country nationals 122, 128, 136–41, 143, 439–40, 455–8, 462–3, 466
third-country workers, highly qualified 455–6
Third Pillar 387, 408
thresholds, minimum 159, 162, 164–5
totalisation 461, 463, 467
tourism, financial aid 472, 478, 480
trade unions 18, 84, 87, 160, 183, 194–5, 368
training 18, 239–40, 288, 297–8, 300–1, 347–8, 423–4, 473
transfer
of pension schemes 397
social 207, 291, 302, 529–30
transgenders 244
transitional periods 59–60, 161
transparency 180, 196, 198, 390, 398–9, 404, 495, 498–9
treatment
cost of 494–5, 497, 501–3, 507
differences of 61–3, 65–7, 69–71, 125–9, 233, 239, 309–10, 313
equal *see* equal treatment
medical 18, 80–2, 282, 438, 490
Member State of 494–5, 498–9, 502–3, 507
preferential 40, 65, 127
Treaty on the Functioning of the EU (TFEU) 133–4, 136–40, 214–16, 292–5, 322–6, 335–9, 375–80, 394–5
tripartite structure 171, 191–2, 194
Trojani case 420, 432
Turkey 63, 75, 80–1, 110, 460, 464, 466

UCITS Directive 385, 409–10
UDHR *see* Universal Declaration of Human Rights
Ukraine 69, 130
uncertainty, legal 341, 397, 433–4
unemployed frontier workers 135, 141, 333
unemployment 5–7, 9, 151–2, 259–60, 269, 274, 346–7, 570
benefits 90, 92, 133, 135, 332–3, 335–6, 346–7, 382
insurance 63, 124–5, 284, 286, 570–1
rates 274, 281, 290–2, 302–3, 307–8, 314
of disabled people 291, 315
Union citizens 413–15, 428, 431, 434–5, 438, 456, 483, 487–8
inactive 414, 428, 434–6
migrant 429, 435–6
United Kingdom 66–9, 71, 75, 77–8, 81, 105–6, 129–30, 386–7
United Nations 22, 535, 550
United States 453
Universal Declaration of Human Rights (UDHR) 4, 6, 10–12, 20, 22, 112, 119, 535
unlimited income tax liability 351–4
unpaid work 260, 262, 265–6
unreasonable burden 134, 312, 341, 413, 428, 430–4, 440
unskilled workers 538–9

very weighty reasons test 62, 65, 71, 73, 138
Vienna Convention on the Law of Treaties 114, 119
visibility 180–1, 198
vocational training *see* training
voluntary guiding instruments 219, 222, 224–5, 227

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

vulnerability 28, 76, 78, 97, 161, 206, 519, 532

wages 90, 152–3, 155–6, 345, 371–4, 377–8, 381, 566
  see also earnings; incomes; salaries
Watts case 503, 505
Wawrzyniak case 329, 351–2, 366
welfare 17, 21, 134, 259, 261–2, 275, 437, 441
  benefits 56, 58–9, 108–9, 114, 124, 131, 430
  state 9, 12–13, 19, 165–6, 261–2, 265, 565, 567
    social 13, 281, 284, 286, 313
    typology 258, 261, 263
  systems 45, 55, 122, 124, 429–31, 436, 502, 512
women 70–3, 233–4, 238–40, 242–8, 250, 257–8, 260–2, 264–77
  and social security 231, 257–77
work 290–2, 345–7, 354–8, 362–5, 368–74, 376–81, 422–4, 481–5
  part-time 244, 253, 262
  temporary 366
  unpaid 260, 262, 265–6
work-related accidents 276, 548
workers 135–40, 194–5, 343–5, 347–50, 354–82, 419–25, 475–7, 481–3
  foreign 46, 135, 325, 331
  freedom of movement 323, 329, 332, 337–8, 380, 382, 566, 572
  mobile 344, 355, 381
  posted 343–5, 365–70, 378–81
  skilled 152–3, 538–9
  status 425, 440, 476, 478
workplaces 20, 287, 297, 299, 304, 312, 356, 358
World Bank 523, 556

youth policies 215–16

Zeman case 72

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access

Frans Pennings and Gijsbert Vonk - 9781782547334
Downloaded from Elgar Online at 11/01/2019 07:37:50AM
via free access